91-1576

(1)

Supreme Court, U.S.
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No.

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

LESTER LEVENE, SR. and SHIRLEY LEVENE
and
AMERICAN CASUALTY INSURANCE COMPANY
Petitioners

versus

PINTAIL ENTERPRISES, INC., LLOYDS OF LONDON,
and
SCOTTSDALE INSURANCE COMPANY
Respondents

FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE

1. Does a vessel owner owe any duty to its non-stevedore employee and/or passenger while conducting hazardous operations under the direction and control of the vessel owner even though part of the operations and the subsequent accident occur away from the vessel? The U.S. Fifth Circuit Court of Appeals' decision concludes that the negligence of a vessel owner under Section 905 (b) is limited to the vessel owner's negligence within the confines of the vessel. Its reasoning would also limit the vessel owner's negligence within the confines of the vessel even if a guest passenger is injured while disembarking from the vessel. This is contrary to the principles enunciated in Kermarec v. Compagnie Generale Transalantique, 358 U.S. 625, 70 S.Ct. 406 (1959) and its progeny and General Maritime Law. The U.S. Fifth Circuit Court of Appeals reaches this result even though the accident occurred in a work area under the direction and control of the vessel owner.

The U.S. Fifth Circuit Court of Appeals erroneously concluded that Scindia Steam Navigation Co. v De Los Santos, 451 U.S. 156 (1981,), requires this result.

It is respectfully submitted that as recognized by the U.S. Fifth Circuit Court of Appeals the issue presented is of significant importance and petitioners urge the review of this entire court.

CERTIFICATE OF INTERESTED PERSONS AND PARTIES

The undersigned, counsel of record for Plaintiffs-Appellants, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1.

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Plaintiffs - Petitioners

2.

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Defendant - Respondent

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9.

Lee Bernard
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Respectfully submitted,

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE CASE

Levene v. Pintail Enterprises, Inc., 943 F.2d 528 (5th Cir. 1991), decided on September 19, 1991.

Levene v. Pintail Enterprises, Inc., Unreported Opinion of Judge F. A. Little, February 8, 1990, United States District Court, Western District of Louisiana, Lafayette-Opelousas Division.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction pursuant to the provisions of 28 U.S.C. Section 1333.

This is an appeal from the United States Fifth Circuit Court of Appeals. The judgment sought to be reviewed was rendered on September 19, 1991, by the U.S. Fifth Circuit.

The Petition for Rehearing and Suggestion for Rehearing En Banc by Appellants was denied by the U.S. Fifth Circuit on October 25, 1991.

STATUTE

33 U.S.C. § 905 Exclusiveness of Liability

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act [33 USCS § 933], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such actin shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of other remedies against the vessel except remedies available under this Act.

STATEMENT OF THE CASE

This is a cause of action for personal injuries sustained by Lester Levene while working as a longshoreman assigned to the M/V Sutton on February 7, 1986. Significantly, the captain had positioned the M/V Sutton against the barge where the accident occurred so as to allow Levene to travel across the barge to look for another inward barge to be transported by the M/V Sutton. Levene was directed by the captain of the vessel to leave the safe confines of the vessel and venture out into treacherous weather over a debris cluttered barge without proper illumination to search for the intended barge requested by the vessel owner. During the performance of his duties in the service of the ship, Mr. Levene was seriously injured on the barge.

A bench trial was conducted on November 20, 1989. The trial court relying on Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), exonerated Pintail from liability under 33 U.S.C. Section 905 (b). A Panel of the U.S. Fifth Circuit Court of Appeals affirmed the district court's conclusion (though not the reasoning) on September 19, 1991. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the U.S. Fifth Circuit on October 25, 1991.

The court of first instance had jurisdiction pursuant to 28 U.S.C. Section 1333. A claim by plaintiffs was made against defendants pursuant to 33 U.S.C. Section 905 (b).

On February 7, 1986, Lester Levene was employed by Pintail Enterprises, Inc. primarily as a heavy equipment operator. The tugboat on which he was working, the M/V Sutton, was operated by Pintail Enterprises, Inc. pursuant to a verbal bareboat charter agreement. Therefore, it is undisputed that Pintail was the owner pro hac vice of the vessel.

The M/V Sutton was manned by a captain, one designated deckhand and Mr. Levene. In essence, Mr. Levene served as a borrowed deckhand at the time of the accident subject to the complete authority and control of the vessel owner through its captain.

Prior to the accident, Levene's duties included assisting

the captain and performing traditional deckhand duties such as line-handling operations.

Immediately before the accident the crew had been working in excess of eighteen (18) hours. The vessel owner had instructed the vessel to search and pick up a barge as the BB-243 located at the Broussard Brothers docking area along the Intracoastal Waterway. As between Pintail and Broussard Brothers it was customary for Pintail to locate the barge leased from the Broussard Brothers' dock area.

The crew had already been working in excess of eighteen (18) hours when the M/V Sutton reached the docking facility. It was late at night, raining very hard, the wind was blowing and there was thunder and lightning.

Despite the inclement weather, the captain decided to continue the search for the unmanned barge. It was the decision of the vessel owner alone to decide whether or not to continue the vessel operations that evening in light of the dangerous conditions.

The captain positioned the bow of the vessel at a midpoint on a barge that was stacked alongside an inland barge. This was done to allow the deckhand and Mr. Levene ingress and egress from the outward barge to the inward barge to determine if the inward barge was actually the one that was chartered by the vessel owner.

The barge that was adjacent to the bow of the M/V Sutton had been loaded two (2) days previously by certain members of the Pintail, but not Mr. Levene. Subsequently, the captain was aware that this particular barge was cluttered with debris and equipment prior to the incident.

At the time of the accident the designated deckhand and Mr. Levene were instructed to go to the mooring bits on the opposite ends of the outward barge and untie the lines in order to release this barge from the inward barge.

The M/V Sutton was equipped with two (2) spotlights, but only one spotlight was operational. The captain aimed the only operational spotlight directly in the middle of the barge to assist the deckhand and Mr. Levene in the line-handling operation. Due to the position of the barge and vessel, the lighting was adequate in the middle of the barge, but not on the extreme right and left ends of the barge where

the mooring bits were located and where Mr. Levene needed to walk.

Despite the continued rain and poor visibility, the captain instructed the Pintail employees to proceed with the line-handling operation. Levene left the Sutton intending to reach the mooring bit in the far right corner of the barge. However, he was forced to walk toward the near right corner of the barge because several obstructions on the barge prevented him from proceeding directly to his intended destination. Levene was injured when he slipped and fell on some slippery substance while attempting to make his way in the dark towards the mooring bit.

The fact that the barge was cluttered with oilfield equipment and debris was known and obvious to the captain. The captain also was well aware of the poor weather conditions, the inadequate lighting and as agent of the vessel owner he decided to extend the operations of the vessel under these dangerous conditions.

In summary, the vessel owner was not only aware of the dangerous weather and conditions on the adjacent barge, but forged ahead with only one spotlight operational which could not provide proper illumination to the two (2) Pintail employees working on opposite ends of the barge. Neither the deckhand nor Mr. Levene were provided with proper illumination in an effort to safely negotiate on the barge in an effort to accomplish the mission mandated by the vessel.

It is clear that although Mr. Levene's accident happened adjacent to the M/V Sutton, the negligence stemmed from the negligence of the vessel owner in operating a defective vessel (only one operational spotlight), failing to provide proper illumination from the vessel to the unlit barge and continuing operations under treacherous circumstances.

ARGUMENT

The following hypothetical using the same factual backdrop illustrates the conflict created by the U.S. Fifth Circuit's decision in the case sub-judice.

Hypothetical:

(1) Let's assume three (3) maritime workers and/or guest passengers are aboard the M/V Sutton.

(2) Further assume that the captain of the vessel instructs all three (3) persons that despite the treacherous weather conditions and inadequate lighting the passengers are to make their way from the vessel to an adjoining barge that is unreasonably dangerous.

(3) Maritime worker and/or guest passenger (A), after leaving the wheelhouse, is injured while making his way along the vessel because he cannot see a dangerous condition on the deck of the vessel. Does maritime worker and/or guest passenger (A) have a valid cause of action under Section 905 (b) and General Maritime Law, respectively? Clearly the answer is a resounding "yes"! See Masinter v. Tenneco Oil Company, 867 F.2d 892 (5th Cir. 1989) and Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406 (1959).

> " . . . it is beyond peradventure that Marlin owed to Masinter a duty of care to take precautions necessary to avoid exposing Masinter to the hazardous conditions created by the placement of the stairway." (867 F.2d at p. 897)

A vessel owner owes a duty of exercising reasonable care to all those who are on board for purposes not inimical to its legitimate interest. See Kermarec, supra.

(4) Let us assume that maritime worker and/or guest passenger (B) alongside maritime worker and/or guest passenger (A) safely negotiates the deck of the vessel but is injured when he slips and falls on a board serving as a gangplank between the vessel and the barge. Does maritime worker and/or guest passenger (B) have a valid cause of action under Section 905 (b) and General Maritime Law, respectively, against the vessel owner for failing to provide

safe ingress and egress? The answer is a resounding "yes"! See Gay v. Barge 266, 915 F.2d 1007 (5th Cir. 1990) and Counts v. Lafayette Crewboats, Inc., 622 F.Supp. 299, 301 (D.C. La. 1983).

(5) Let us further assume that maritime worker and/or guest passenger (C) (Lester Levene) is fortunate to negotiate the hazardous vessel deck, even more fortunate to negotiate the wooden gangplank, but is less fortunate in trying to make his way over the barge as directed to do by the vessel owner. Does maritime worker and/or guest passenger (C) (Lester Levene) have a valid cause of action under Section 905 (b) and General Maritime Law, respectively? The answer should be "yes" because as in Masinter and in Gay the vessel owner is liable for providing a safe work place under the vessel owner's control.

The vessel owner must provide a passenger a reasonably safe means of ingress and egress from the vessel, proper gangways, landing places, and personnel assistance. See Tittle v. Aldacosta, 544 F.2d 752 (5th Cir. 1977) and Arthur v. Flota Merconte Gran Centro Americana, S.A., 487 F.2d 561 (5th Cir. 1974).

This duty also includes situations when a passenger is trying to disembark from the vessel onto the barge and is injured on the barge. See Marshall v. Westfal-Larsen & Co., 259 F.2d 575 (9th Cir. 1958).

Taking the hypothetical one step further, let us assume that another maritime worker and/or guest passenger (we will call him (D)) in order to return to the vessel must use a swing rope adjacent to a platform in order to swing over the barge back to the M/V Sutton. Unfortunately, maritime worker and/or guest passenger (D) does not quite make it to a safe area of the vessel's deck and is injured. Does maritime worker and/or guest passenger (D) have a valid cause of action under Section 905 (b) and General Maritime Law, respectively? The answer is "yes"! See Musial v. A & A Boats, Inc., 696 F.2d 1149 (5th Cir. 1983) and Martin v. Walk, Haydel & Associates, Inc., 742 F.2d 246 (5th Cir. 1984).

It is submitted that the legal conclusion of the U.S. Fifth Circuit is completely at odds with established precedent of the U.S. Supreme Court and conflicts with the Ninth Circuit's

decision in Marshall, supra. This Honorable Court should grant the Writ for Certiorari to resolve the conflict between the Ninth Circuit and Fifth Circuit regarding whether a vessel owner owes a duty to passengers and/or maritime workers who are actually injured outside the confines of the vessel.

ANALYSIS

Under the facts and circumstances of this case, it is submitted that the appropriate inquiry is as follows:

(1) Does the Scindia analysis apply to this 905(b) action in lieu of the duty to exercise reasonable care under the circumstances of each case as set forth in Kermarec v. Compagnie Generale Transatlantique, 79 S.Ct. 406 (1959) and Federal Marine Terminal, Inc. v. Burnside Shipping, Ltd., 89 S.Ct. 1144 (1969)?

(2) If the Scindia analysis is applicable; did the U.S. Fifth Circuit decision correctly analyze this case in light of the legal principles established by this Honorable Court and other circuits?

Petitioners submit the analysis should begin with a review of the relevant statutes. Section 905(b) reads as follows:

> "In the event of injury to a person covered under this act caused by the negligence of a vessel . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . ."

It is undisputed under that facts of this case that the dual capacity doctrine is applicable and that Pintail is the vessel owner for purposes of Section 905(b). It is also clear that the statute does not define what is "negligence of a vessel." This section does place a limitation on recovery if the person employed by the vessel is providing stevedoring services, then no action will be permitted if the negligence resulted from those also engaged in providing stevedoring services. In fact, throughout the appellate history of this case, Pintail strenuously argued that the stevedoring limitation set forth under Section 905(b) was applicable arguing that the negligence of the captain was not vessel negligence but employer or stevedore negligence. Pintail also strenuously argued that Levene was acting as a stevedore. The Fifth Circuit expressed doubt that Levene was acting as a stevedore, though it concluded that it need not decide this question. See

though it concluded that it need not decide this question. See Page 9 of the Fifth Circuit decision. However, the Fifth Circuit never analyzed the actions of the captain as agent of the vessel owner as to whether his negligence was vessel negligence versus employer negligence. The only finding that could be reached was that the captain was acting as master of the vessel and not acting as a stevedore or employer. The Fifth Circuit simply concluded that the vessel owner had no obligation to Mr. Levene under Section 905 (b) because this accident occurred away from the vessel.

Under 33 U.S.C. Section 902 (21) the term "vessel" means any vessel upon which or in connection with which any person entitled to benefit under this act suffers injury or death or arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charterer or bareboat charter, master, officer or crew member. Clearly, the act does not require physical injury upon the vessel for recovery under Section 905 (b). This has always been the rule under General Maritime Law for guest passengers. There is no requirement that physical injury occur upon the vessel for recovery under General Maritime Law as against the vessel owner.

Does the jurisprudence of the Fifth Circuit limit recovery to injuries only occurring on the owner's vessel? Vessel negligence can take many forms. Consider Masinter, Helaire, Musial, Scindia, etc. Vessel negligence can be of omission or commission arising out of a defective vessel, an unsafe appurtenance, or an imprudent direction emanating from the vessel's owner or agent. Prior to the Fifth Circuit decision, no Court has EVER concluded that a vessel owner has no obligation to a party simply because the accident occurred outside the confines of the vessel when, in fact, the vessel was the precipitating cause of the accident.

Suppose that while Lester Levene was on the adjacent barge, the captain negligently rammed the barge on which Levene was standing with the tug and knocked Mr. Levene down into the water. Under the reasoning set forth by the U.S. Fifth Circuit, Mr. Levene would have no cause of action against the vessel owner under Section 905 (b) or under General Maritime Law. Is there any legal distinction in the

captain bumping the barge with the vessel knocking down Mr. Levene versus directing him onto the adjacent barge in treacherous weather without proper illumination? This type of action has always been considered to be vessel negligence. See Masinter, Musial, supra and Pichoff v. Bisso Towboat Co., Inc., 748 F.2d 300 (5th Cir. 1984).

The Fifth Circuit did note that it does not agree with the district court's analysis. The district court likened Pintail's action in turning over the tug after inspecting it and finding no hidden hazards to a ship owner turning over a ship to a stevedore. "Once the line-handling operation began, Pintail was under no duty to supervise the work, especially where it took place on another ship." The district court also held that Pintail did not breach its duty under Scindia to intervene because "the scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which a stevedore is assigned." The Fifth Circuit disagreed stating:

> "While we disagree with the district court's characterization of any Scindia duty as applying only to stevedoring operations, we may affirm the judgment even though the district court may have arrived there through a method of reasoning that we would not adopt."

It is submitted that the only way to reach the result of the Fifth Circuit is to determine that (1) the actions of the captain cannot be construed as vessel negligence; or (2) the vessel owner simply owes no obligation beyond the parameters of the vessel.

Let us closely look at Page 13 of the Fifth Circuit's decision.

> "Levene essentially argues that, because he was performing non-stevedoring operations on a separate barge, Pintail's duties extended beyond the Scindia duties of ensuring the safety of the Sutton, preventing unreasonable hazards once the operation began, and intervening with respect to obvious dangers.

> He asked us to fashion a standard of care in which a vessel owner such as Pintail must protect him from unreasonably dangerous conditions on any vessel he happens to board while carrying out his duties for his employer/ vessel owner. We think such a rule is foreclosed by the Supreme Court's decision in Scindia and our case is recognizing that Scindia alone applies to substantive negligent standards in an action under Section 905 (b). We cannot find in Scindia any mandate for extending the duty of a ship owner to protection against hazards on another ship."

Petitioners agree that a vessel owner should not be responsible per se for the hazards on an adjoining vessel. However, the vessel owner should be responsible for sending out workers in the employ of the ship to work in hazardous conditions with a defective spotlight providing improper illumination and knowing that the worker will encounter a hazardous and slippery deck on the adjacent barge cluttered with debris.

The panel apparently felt their conclusion was mandated by Scindia.

> "Absent alteration by the Supreme Court of the fairly detailed duties, it has interpreted Section 905(b) as imposing, we decline to fashion a general standard of 'reasonable care' that would require a ship owner to protect against any and all hazards a longshoreman might encounter in the course of his work. Other than the duty to protect against hazards under the control of the ship (which we consider a narrow exception discussed below), we do not think Scindia imposes any duty on a ship owner to protect against hazards arising on a separate ship."

Returning to the hypothetical situation, let us suppose that the vessel drops off Levene on a barge obviously unseaworthy and that barge sinks injuring or drowning Mr. Levene. Under the Fifth Circuit decision there would be no cause of action under Section 905(b) or under the General

Maritime Law.

The Fifth Circuit decision does recognize that Pintail may be held liable for injury caused by hazards "under control of the tug." In Helaire, it was stated that:

> "The owner has a duty to avoid exposing longshoreman to harm 'from hazards under the act or control of the vessel.' Id. at 1036, citing Scindia, 451 U.S. at 167; see also Masinter. However, we do not view the fleeting contact between Pintail and the BB-242 as a kind of control that could result in a finding of liability."

Petitioners certainly acknowledge that the M/V Sutton had fleeting contact with the adjacent barge. However, it is respectfully submitted the Fifth Circuit erroneously equates control over the adjoining vessel with "hazards under the control of the tug." Simply stated, Pintail had complete control and authority (which it exercised) to determine if the work should have been undertaken and the method and manner of illuminating the workplace especially when Pintail knew of the dangers associated with the barge.

Furthermore, the Fifth Circuit's decision incorrectly concluded that there was no evidence that Pintail had any responsibility for the condition of the deck of the barge. There was direct testimony that only two (2) days earlier Pintail had littered the barge with equipment. Whether or not Pintail had any responsibility for the condition of the barge deck is immaterial because Pintail was directly responsible for ordering the crew to proceed under the hazardous conditions!

It is respectfully submitted that the U. S. Fifth Circuit either erroneously concluded that the Scindia analysis is applicable or at the very least has misinterpreted the Scindia doctrine.

Petitioners submit it is legally appropriate to analyze closely whether or not the Scindia analysis is applicable. In Kermarec, supra, the U.S. Supreme Court stated the following:

> "It is the subtle principle of maritime law that a ship owner owes a duty to exercise reasonable care to those lawfully aboard the vessel who

> are not members of the crew . . ." (79 S.Ct. at P. 409)
>
> "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to its legitimate interest the duty of exercising reasonable care under the circumstances of each case." (Emphasis added) (79 S.Ct. at P. 410)

Likewise, see Federal Marine Terminal, Inc. v. Burnside Ship. Co., Ltd., 89 S.Ct 1144 (1969) wherein the U.S. Supreme Court held that a vessel owner owes a duty of due care to not only the stevedoring company, but to others lawfully on the ship. In Burnside, the plaintiff claimed that the vessel owner was negligent for failing to properly guard a deep tank opening, failure to provide clear passageway, and a failure to provide adequate lighting, etc., said allegations similar to those asserted in the instant case.

The highest court confirmed that reasonable care approach in Scindia.

> ". . . this court reversed, preferring to adopt a single duty of 'exercising reasonable care under the circumstances of each case,' rather than to incorporate in the maritime law the complexities of the common law of invitee and licensee. (Citation submitted.) . . . the Kermarec standard was reaffirmed in Federal Marine Terminal v. Burnside Ship. Co., Ltd., (citations omitted), a case involving a suit by a stevedore against a ship owner. We have no quarrel with this standard. INEVITABLY, HOWEVER, THE RULE WILL UNDERGO REFINEMENT AS IT IS APPLIED TO VARIOUS CATEGORIES OF CASES . . ." (Emphasis added) (101 S.Ct. at p. 1620, n.10)

The Supreme Court recognized that a "reasonable care" standard would have the necessary flexibility given the particular circumstances of a case.

The Fifth Circuit decision not only misinterprets Scindia but refuses to consider the Kermarec rule and the Scindia "reasonable care standard."

Gilmore & Black, "The Law on Admiralty", Second Edition, succinctly state the issue the Fifth Circuit overlooks.

> "Kermarec may reasonably be cited to the proposition that the same standard of care is owed to all persons who are legitimately on the ship -- crew members, passengers, longshoreman, repairmen, even those who at common law would have been described as "mere licensees." For present purposes we may leave the passengers and guests to fight their own battles. The longshoreman and repairmen are on the ship in furtherance of the shipowner's commercial interests. They are, as the Supreme Court liked to put it during the Sieracki period, doing the ship's work -- arguably, work that at our time was performed by the crew -- they are unquestionably subject to the ship's hazards. As Justice Black, speaking of a repairman, wrote in Pope & Talbot, Inc. v. Hawn:
>
> > 'His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under the law.'" Id. at 453-454.

The Fifth Circuit's holding is contrary to many of its own decisions interpreting a vessel owner's liability under 905(b).

In Musial v. A & A Boats, Inc., 696 F.2d 1149 (5th Cir. 1983), the Fifth Circuit refused to apply the Scindia analysis in evaluating the vessel owner's negligence in the context of the use of a swing rope from an oil platform to the vessel.

See also Pichoff v. Bisso Towboat Co., Inc., 748 F.2d 300 (5th Cir. 1984). The trial court made the following conclusions:

> "Bisso was negligent in failing to provide Pichoff with adequate lighting . . . Had Bisso provided a drop light, Pichoff would likely have 'not injured himself.' It was foreseeable that Pichoff

> would need a drop light to provide greater illumination to free his hands while he inspected the compartment. Bisso was negligent in ordering Pichoff to conduct a hurried inspection without one."

The Fifth Circuit's decision seems to suggest that the decision of Castorina v. Lykes Bros. S.S. Co., 758 F.2d 1025 (5th Cir. 1985) somehow limits Pichoff"... we think our later decision in Castorina does not leave any room for the broad-based duty Levene urges."

Pichoff is still good law in the Fifth Circuit and has been cited with approval in Gay v. Barge 266, supra.

Petitioners have no quarrel with Castorina which concerns the duty of the vessel owner for the latent defects in the vessel's cargo. Petitioners firmly believe this was a case correctly decided properly under the Scindia analysis. However, the instant case like Pichoff is not subject to the Scindia analysis, but the reasonable care standard that the Supreme Court has recognized and followed in this Circuit. Kermarec, Federal Marine Terminal, Inc., Pichoff, Musial.

Petitioners argued that under the circumstances of this case, especially considering that Levene was actually performing traditional seaman duties, the standard of care owed the vessel owner under the Scindia "reasonable care approach" should be akin to the duty owed under the Jones Act. This makes sense because a co-employee deckhand performing the exact duties of Levene was a Jones Act seaman. A Jones Act employer through its captain could certainly be considered negligent and responsible to the deckhand under the Jones Act even though the accident occurred away from the vessel. Thus, in the context of this particular case, it is submitted that the vessel owner using a "reasonable care" approach owed a duty not to send Levene out on the adjacent barge given the poor weather conditions, the lack of illumination and the hazards associated with the barge itself, all known and recognized by the vessel owner. Such a rule would bring uniformity in the General Maritime Law for workers exposed to identical risks and dangers. See Pope & Talbot, Inc. v. Hawn, 74 S.Ct. 202 (1953).

CONCLUSION

Both the Supreme Court and the Fifth Circuit have stressed the need for uniformity in our maritime law. It is respectfully submitted the Fifth Circuit decision does considerable violence to the "reasonable care approach" adopted by this Court with respect to the duties owed by vessel owners to those lawfully aboard the vessel. Federal Marine Terminal, Inc., Kermarec and Pope, supra.

Petitioners urge that a reasonable care standard under general maritime law principles is a standard that has been adopted by the highest court of this land. Kermarec, Federal Marine Terminal, Inc., supra and applicable to this case.

Whether or not the Scindia analysis is appropriate, it is absolutely clear that the vessel owner was responsible for jettisoning Mr. Levene into the hazards that led to his accident. This vessel negligence should be addressed and remedied by the entirety of this Honorable Court under principles that promote uniformity, reasonableness and flexibility.

Respectfully submitted,
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APPENDIX

1. U. S. Fifth Circuit Court of Appeals Denial on Petition for Rehearing and Suggestion for Rehearing En Banc.

2. Levene v. Pintail Enterprises, Inc., 943 F.2d 528 (5th Cir. 1991), decided on September 19, 1991.

3. Levene v. Pintail Enterprises, Inc., Unreported Opinion of Judge F. A. Little, February 8, 1990, United States District Court, Western District of Louisiana, Lafayette-Opelousas Division.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4155

LESTER LEVENE, SR. and
SHIRLEY LEVENE,

Plaintiffs - Appellants,

and

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA,

Intervenor - Appellant,

versus

PINTAIL ENTERPRISES, INC., and
LLOYDS OF LONDON, AND
SCOTTSDALE INSURANCE CO.,

Defendants - Appellees.

— — — — — — — — — — — —

Appeal from the United States District Court for the
Western District of Louisiana

— — — — — — — — — — — —

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., 198__, _____ F.2d _____)

(October 25, 1991)

Before WISDOM, KING and BARKSDALE, Circuit Judges.

PER CARIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Judge Smith did not participate in the consideration of the suggestion for rehearing en banc.

Lester LEVENE, Sr. and Shirley Levene, Plaintiffs-Appellants,

American Casualty Company of Reading, Pennsylvania, Intervenor-Appellant,

v.

PINTAIL ENTERPRISES, INC., Lloyds of London and Scottsdale Insurance Company, Defendants-Appellees.

No. 90-4155.

United States Court of Appeals,
Fifth Circuit.

Sept. 19, 1991.

Nonstevedore employed aboard tugboat sued employer under Longshore and Harbor Workers' Compensation Act (LHWCA), alleging that employee in linehandling operation on barge owned by another, whereby tugboat moved barge in order to free another barge. The United States District Court for the Western District of Louisiana, F. A. Little, Jr., J., dismissed action. Employee appealed. The Court of Appeals, King, Circuit Judge, held that: (1) employer had immunity under LHWCA in its capacity as employer, regardless of whether employee was performing stevedoring operations; (2) vessel owner does not owe duties other than those enumerated in Supreme Court's Scindia decision to its nonstevedore employee conducting operations on separate vessel; and (3) employer did not have constructive control over work area of barge.

Affirmed.

1. Shipping — 84(1)

To recover under LHWCA, worker must be engaged in maritime employment and be injured on maritime situs. Longshore and Harbor Workers' Compensation Act, §§ 4, 33 U.S.C.A. §§ 904, 905(b).

2. Workers' Compensation — 2162

Under LHWCA, when employer acts in dual capacity as vessel owner, entity retains its immunity for acts taken in its capacity as employer, but may still be sued "qua vessel" for acts of vessel negligence. Longshore and Harbor Workers' Compensation Act, §§ 4, 5(a,b), 33 U.S.C.A. §§ 904, 905(a,b).

3. Workers' Compensation — 2085

Availability of tort remedy for vessel negligence is limited exception to general structure of LHWCA, which, like stare workers' compensation schemes, generally replaces negligence causes of action against employers with system of predetermined, standardized benefits. Longshore and Harbor Workers' Compensation Act, §§ 4, 5(a,b), 33 U.S.C.A. §§ 904, 905(a,b).

4. Workers' Compensation — 2085

Under LHWCA, employer was immune from liability for vessel captain's decision to continue working despite inclement weather, and his alleged failures to provide adequate illumination and to provide safe workplace, resulting in injury to employee on barge owned by another, regardless of whether employee was acting as stevedore or any other type of harbor worker. Longshore and Harbor Workers' Compensation Act, § 5(a), 33 U.S.C.A. § 905(a).

5. Shipping — 84(4)

Longshore and Harbor Workers' Compensation Act (LHWCA) section barring suits against owner-employers for injuries caused by fellow servants has nothing to do with circumstances under which employer retains immunity; it simply bars suits for vessel negligence against vessel owner when injury was caused by negligence of stevedore's fellow servant. Longshore and Harbor Workers' Compensation

Act, § 5(b), 33 U.S.C.A. § 905(b).

6. Shipping — 84(1)

Under LHWCA, vessel owner owes no duties other than those enumerated in Supreme Courts' Scindia decision to its nonstevedore employee conducting operations on separate vessel. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

7. Shipping — 84(2)

Before stevedoring operations begin, vessel owner must warn stevedore of hidden dangers that could not be discovered by exercise of ordinary care. Longshore and Harbor Workers' Compensation Act, § 5(b) 33 U.S.C.A. § 905(b).

8. Federal Courts — 761

Court of Appeals may affirm district court's judgement even though district court many have arrived there through method of reasoning that Court of Appeals would not adopt.

9. Workers' Compensation — 2085

Longshore and Harbor Workers Compensation Act (LHWCA) foreclosed vessel owner's liability in negligence to its employee injured in barge owned by another; vessel owner had contact with barge only for short time and only by chance as part of operation to free another barge, and thus, vessel owner did not have constructive control over work area of barge and was not responsible for condition of its deck. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

Appeals from the United States District Court for the Western District of Louisiana.

Before WISDOM, KING, and BARKSDALE, Circuit Judges.

KING, Circuit Judge:

The principal question in this appeal is whether a vessel owner owes any duties other than those enumerated in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), to its non-stevedore employee conducting operations on a separate vessel. The district court, applying the Scindia standards, found that the vessel owner breached no duty to its employee, and dismissed the employee's claims. We agree with the district court's conclusion that Scindia provides the proper framework for analysis in this case, and accordingly affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

The district court found the following facts, which we accept as not clearly erroneous. Kendall v. Block, 821 F.2d 1142, 1146 (5th Cir.1987); O'Malley v. United States Fidelity & Guaranty Co., 776 F.2d 494, 497 (5th Cir.1985).

LEVENE v. Pintail ENTERPRISES, INC.

Lester Levene was employed by Pintail Enterprises primarily as a heavy equipment operator, but he occasionally performed other work for Pintail as needed. On the morning of the February 7, 1986, Captain Preston Hebert, a Pintail employee, inspected the M/V SUTTON, a tugboat chartered and operated by Pintail, and determined that the SUTTON was fit for its intended voyage. Levene, Hebert and Kevin Warner, another Pintail employee, boarded the SUTTON and proceeded to a drilling site, where they performed their daily work. Hebert then was instructed to proceed to Broussard Bros., a barge facility in Intercostal City, Louisiana, to pick up a barge for the next day's work.

Enroute, night fell and rain began to fall. The crew was to pick up a barge, known as the BB-243, but they found another barge, the BB-242, blocking their access.[1] It was thus necessary to untie the BB-242 and move it out of the way.

Captain Hebert positioned the SUTTON's bow against the side of the BB-242 and aimed the SUTTON's spotlight down the middle of the barge. He then sent Levene and Warner onto the BB-242 and instructed them to untie the lines from the mooring bits at opposite ends of the barge. By this time the rain was steady, wind blowing, and there was thunder and lighting.

Because of the positions of the SUTTON and the BB-242, the spotlight provided adequate illumination down the middle of the barge, but the light tapered off and became dim at the ends of the barge where the mooring bits were located. Despite the rain and poor visibility, Levene and Warner proceeded to carry out Captain Hebert's instructions. They could see a variety of objects on the deck of the BB-242, including oilfield equipment and scrap material. Levene intended to go to the mooring bit at the far right corner, but the obstructions forced him to walk initially toward the near right bit. He did this despite the presence of scrap material and grease in his path. Halfway to the mooring bit, Levene slipped and injured his knee. He continued with the linehandling operation, and then returned to the SUTTON and told Hebert about the accident.

Levene filed suit against Pintail, Broussard Bros. (owner of the barge) and Lee Bernard (owner of the SUTTON)[2] under the Jones Act, 46 U.S.App. § 688, and the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 et seq. (LHWCA), alleging that Pintail, Bernard and Broussard

1. Both barges were flatbed barges approximately 120 feet long and 30 feet wide, with decks three feet above the water line.

2. Bernard leased the SUTTON to Pintail under an oral bareboat charter agreement. The parties do not dispute that Pintail may be held liable as owner of the SUTTON. For the sake of simplicity, we refer throughout to Pintail as a vessel owner.

negligently caused the injury he sustained in the BB-242. The district court granted the defendants summary judgment on the Jones Act claim and conducted a bench trial on the LHWCA claim against Pintail.[3] He amended his complaint to add certain of the defendants' insurers.[4] The court agreed with Pintail that Levene's allegations of negligence-including Pintail's failure properly to illuminate the work area on the BB-242, its failure to clear a path or warn Levene of hazards on the barge, and its insistence on working in bad weather - constituted the potential negligence of Levene's employer. The court held that Pintail's statutory immunity from tort suit for negligent acts taken in its capacity as Levene's employer barred recovery for these acts. The court concluded that there were no reasonably dangerous conditions aboard the SUTTON of which Levene was not warned, and that Pintail came under no duty to intervene to prevent any injury during the line-handling operation. The court entered judgement dismissing all of the Levene's claims, and Levene filed this appeal.

II. ANALYSIS

[1] To recover under the LHWCA, a worker must be engaged in maritime employment and be injured on a maritime situs. Northeast Marine Terminal v. Caputo, 432 U.S. 249, 255, 97 S. Ct. 2348, 2353, 53 L.Ed.2d 320 (1977). The LHWCA provides for two different types of liability. Under § 904, a covered worker may receive compensation benefits from his employer without regard to fault. Under § 904(b), the same worker may pursue a tort action against the owner of a vessel for acts of vessel negligence. Thus, for example, a longshoreman working for an independent stevedore may recover benefits from his employer and may pursue

3. Levene settled his claims against Broussard Bros., the owner of the barge, prior to trial. He has not appealed the dismissal of the Jones Act Claim.

4. Because we affirm the judgement, we need not address the coverage issues raised on appeal by the insurers.

a separate action in tort against the owner of the vessel on which he was injured. He may not, however, sue his employer in tort. Section 905(a) affords employers full immunity from tort suits by providing that compensation benefits "shall be exclusive and in place of all other liability of such employer to the employee..."

[2,3] Frequently, however, a longshoreman is injured on a vessel owned by his employer. When an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued "qua vessel" for acts of vessel negligence. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 532, 103 S.Ct. 2541, 2548, 76 L.Ed.2d 768 (1983); Kerr-McGee Corp v. Ma-Ju Marine Serv., Inc., 830 F.2d. 1332, 1339 (5th Cir.1987). The difference between the capacities in which an employer may act is extremely important. The availability of a tort remedy for vessel negligence is a limited exception to the general structure of the LHWCA,[5] which, like state workers compensation schemes, generally, replaces negligence causes of action against employers with a system of predetermined, standardized benefits. Therefore, we have held that an employer that also functions as a vessel owner is liable for vessel negligence under the same negligence standards applicable to an independent vessel owner. Castorina v. Lykes Bros. S.S. Co., 758 F.2d. 1025, 1033 (5th Cir.), cert. denied, 474 U.S. 846, 106 S.Ct. 137, 88 L.Ed.@d 113 (1985) ("duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel") The LHWCA absolutely bars suit for all other acts taken in the capacity as the employer of the injured worker.

This case is like Jones & Laughlin in that Pintail occupied a dual capacity as Levene's employer and vessel owner. Levene contends, however, that Pintail as employer is not

5. See, e.g., Fruge v. Penrod Drilling Co., 918 F.2d 1163, 1169 (5th Cir.1990) (describing Scindia as setting forth "broad pronouncements of immunity on the part of the vessel owner"); Masinter v. Tenneco Oil Co., 867 .2d 892, 896 .2d 191 5th (Cir.1991).

immune from an action sounding in negligence because the principles of employer immunity under the LHWCA apply only to injured stevedores. We reject this argument as contrary to the plain language of the LHWCA and the consistent holdings of our cases. A better argument, and, we think the one that presents the important question in this appeal, is that Pintail had a duty broader than that set forth in Scindia to protect Levene from injury on a barge separate from the Pintail vessel.

A. Applicability of Employer Immunity

[4] Levene first argues that Pintail has no immunity in its capacity as employer because Levene and Captain Hebert were not performing stevedoring operations. He contends that "Pintail does not enjoy statutory immunity if its negligence does not arise out of 'stevedoring services.' To enjoy the statutory immunity, Pintail must demonstrate that (1) the captain was performing stevedoring services and (2) Lester Levene was performing stevedoring services." (emphasis in original). Levene appears to derive this argument from the following sentence in § 905(b), the section which provides for an action against a vessel for vessel negligence:

> If [an injured worker] was employed by the vessel to provide stevedoring services, no [negligence action against the vessel] shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

33 U.S.C. § 905(b). Having concluded that Pintail is not immune from liability for acts of negligence in its capacity as employer, Levene contends that Captain Herbert's decision to continue working despite the weather, his failure to provide adequate illumination, and his failure to provide a safe place to work should result in a finding that Pintail is liable for his injury.

We think Levene misconstrues both § 905(b) and the structure of employer immunity. Section 905(b) is concerned solely with granting an injured worker a tort remedy against a vessel negligence, e.g., Masinter v. Tenneco Oil Co., 867 F.2d 892, 896(5th Cir.1989); Teply v. Mobil Oil Corp., 859

F.2d. 375, 377(5th Cir.1988), and has nothing to say about the general immunity granted to an employer. That task is performed by § 904 (compensation based on predetermined benefit schedules) "shall be exclusive and in place of all other liability of [an] employer to the employee. . . ."

[5] In Jones & Laughlin, the Court took the sentence quoted above from § 905(b) as evidence that Congress intended to preserve the action for vessel negligence when the employer is also the vessel owner: why, the Court asked, would Congress have inserted this sentence barring suits against owner- employers for injuries caused by fellow servants if it had intended to bar all suits against employer owners in § 905(a). Jones & Laughlin, 462 U.S. at 530-31, 103 S.Ct. at 2547. It is evident that this sentence has nothing to do with the circumstances under which an employer retains immunity. It simply bars suits for vessel negligence of a stevedore's fellow servant. See Cavalier v. T. Smith & Son, Inc., 668 F.2d. 861 (5th Cir.), cert. denied, 495 U.S. 860, 103 S.Ct. 134, 74 L.Ed.2d. 115 (1982).

The relevant section of the LHWCA for purposes of Levene's argument is § 905(a). As noted above, that section provides tort immunity for all negligent acts taken in the capacity as employer, and leaves an injured worker with LHWCA benefits as his exclusive remedy against his employer. Moore v. Phillips Petroleum Co., 912 F.2d 789, 791 (5th Cir.1990); Foreman v. Exxon Corp., 770 F.2d. 490, 494 (5th Cir.1985). Nothing in § 905(a) or Jones & Laughlin suggests that workers are injured on vessels owned by their employers, the statute grants immunity only if the worker was performing stevedoring operations. Pintail argues strenuously that Levene was performing stevedoring operations and that therefore Pintail retains its immunity. While we doubt that Levene was acting as a stevedore, we need not decide this question, for it is cleat that so long as Levene was a covered worker under the LHWCA- whether he was a stevedore of any other type of harbor worker-Pintail as employer enjoys full immunity from suit. We have on numerous occasions precluded recovery against an employer

by injured workers performing non-stevedoring activities, e.g. Moore, 912 F.2d at 791; Johnson v. Odeco Oil & Gas Co., 864 F.2d 40, 44(5th Cir.1989); Robin v. Sun Oil Co., 584 F.2d 54, 556 (5th Cir.1977), and we follow this rule today.

Levene's allegations that Pintail failed adequately of illuminate his path and did not provide him with a safe place to work are best characterized as acts of the employer. We agree with the district court that Pintail is immune from suit for these acts. Under Jones & Laughlin, however, Pintail may be liable for negligence in its capacity as a vessel owner. We turn next to the question whether, in this capacity, Pintail breached any duty it owed to Levene.

B. Vessel Negligence

[6] Levene next argues that Pintail as a vessel owner breached a duty it owed him even though he was not injured by a dangerous condition of the SUTTON. The district court held that the duties owed Levene were those set forth in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 456, 101 S.Ct. 1614, 68 L.Ed.2d 1(1981), and determined that Pintail committed no vessel negligence under that Scindia test. Levene contends that the district court erred because Scindia does not define the full scope of a vessel owner's duties when an employee is not injured on the owner's vessel.

[7] Congress in § 905(b) replaced the unseaworthiness cause of action against a vessel with liability based on negligence, bur gave no indication of what acts would constitute negligence. Scindia constituted the Supreme Court's effort to create substantive standards of negligence. See Castorina, 758 F.2d at 1032. In Scindia, the Court held that a vessel owner has three broad duties to a longshoreman engaged in stevedoring operations. Before operations begin, the owner must exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety. . . ." Scindia, 451 U.S. at 167, 101

S.Ct. at 1622. The owner at this time also must warn the stevedore of hidden dangers that could not be discovered by the exercise of ordinary care. Ida.; Theriot v. Bay Drilling Corp., 783 F.2d 527, 535 (5th Cir.1986) Once stevedoring operations have begun, the owner has no duty to supervise or inspect the work and must only take care to prevent unreasonable hazards. Scindia, 451 U.S. at 172, 101 S.Ct. at 1624; Futo v. Lykes Bros. S.S. Co., 172 F.2d 209, 213 (5th Cir.1984). There is an exception to this limited liability after operations have begun. The vessel owner must intervene with respect to obvious dangers if it acquires actual knowledge that a condition of the vessel or its equipment poses an unreasonable risk of harm and if the vessel owner acquires knowledge that the stevedore is not exercising reasonable care to protect its employees. Scindia, 451 U.S. at 175-76, 101 S.Ct. at 1626; Lormand b. Superior Oil Co., 845 F.2d 536, 542 (5th Cir.1987), cert. denied, 484 U.S. 1031, 108 S.Ct.739, 98 L.Ed.2d 774(1988).[6]

We have held that although Scindia arose in the context of stevedoring operations, the duties it enumerates are not limited to stevedores. In Lormand, we found that Scindia defined the duties owed to the LHWCA-covered employee of an independent contractor working aboard a jack-up vessel. Lormand, 845 F.2d at 541-42; see also Hill v. Texaco, Inc., 674 F.2d 447, 451 (5th Cir.1982). Similarly, in Teply we

6. Consequently, we have recognized three exceptions to the general rule of nonliability once operations have begun.
Vessel owner liability may arise:
1. [if the vessel owner fails] to warn on turning over the ship of hidden defects of which he should have known [Exception 1]
2. for injury caused by hazards under the control of the ship [Exception 2]
3. [if the vessel owner fails] to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of "obviously improvident" judgement, means to work on in the face of it and therefore cannot be relied on to remedy it. [Exception 3]

Masinter, 867 F.2d at 896-97 (citing Turner v. Costa Line Cargo Services, Inc., 744 F.2d 505, 512 (5th Cir.1984) (Gee, J. dissenting)).

stated that in Scindia "[t]he Supreme Court interpreted § 905(b) as it applies to stevedores, but in principle as it applies to other harborworkers who work on board vessels as well." Teply, 859 F.2d at 377. As noted earlier, we have held that Scindia defines the duties owed to an injured worker by a vessel owner acting in a dual capacity as employer. Castorina, 758 F.2d at 1033. Thus, we believe, as did the district court, that Scindia governs Levene's § 905(b) action against Pintail for vessel negligence.[7]

[8] The district court determined that Pintail had not breached its duties under Scindia because Pintail "satisfied its obligation to provide its employees with a safe ship." The court likened Pintail's action in turning over the tug after inspecting it and finding no hidden hazards to a shipowner turning over a ship to a stevedore. Once the line-handling operation began, Pintail was under no duty to supervise the work, especially where it took place on another ship. The court also held that Pintail did not breach its duty under Scindia to intervene because "[t]he scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which the stevedore is assigned." While we disagree with the district court's characterization of any Scindia duty as applying only to stevedoring operations, we may affirm the judgment even though a method of reasoning that we would not

7. Levene argues that, because Pintail was a Jones Act employer with respect to Captain Hebert and Kevin Warner, and because both Levene and Warner were performing the traditional duties of seamen on the night of the accident, Pintail should be held to a "Jones Act-like" standard of care in this case. We have held, however, that a worker "does not cease to be covered by the [LHWCA] merely because at the moment of injury he is not performing his usual duties." Reynolds v. Ingalls Shipbuilding Division, 788 F.2d 264, 271 n. 8 (5th Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 278, 93 L.Ed.2d 253 (1986). Jones Act duties apply only when a worker meets the test of seamen status in Barrett v. Chevron U.S.A., 781 F.2d 1067 (5th Cir.1986) (en banc); Levene concedes that he is covered by the LHWCA, not the Jones Act, and we therefore decline to apply any standards to Pintail other than those mandated by the LHWCA.

adopt. Masinter of Texas System Police, 792 F.2d 1360, 1362 n. 3 (5th Cir.1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987).

Levene essentially argues that, because he was performing non-stevedoring operations on a separate barge, Pintail's duties extended beyond the Scindia duties of ensuring the safety of the SUTTON, preventing unreasonable hazards once the operation began, and intervening with respect to obvious dangers. He asks us to fashion a standard of care in which a vessel owner such as Pintail must protect him from unreasonably dangerous conditions on any vessel he happens to board while carrying out his duties for his employer-vessel owner. We think such a rule is foreclosed by the Supreme Court's decision in Scindia and our cases recognizing that Scindia alone supplies the substantive negligence standards in an action under § 905(b). We cannot find in Scindia any mandate for extending the duty of a shipowner to protection against hazards on another ship. The very notion under the dual capacity doctrine of holding one single entity liable for the negligence of "the vessel" but not for the negligence of "the employer" serves to limit liability to those acts taken in connection with the owned vessel itself. Absent alteration by the Supreme Court of the fairly detailed duties it has interpreted § 905(b) as imposing, we decline to fashion a general standard of "reasonable care" that would require a shipowner to protect against hazards under control of the ship (which we consider a narrow exception and discuss below), we do not think Scindia imposes any duty on a shipowner to protect against hazards arising on a separate ship.

Levene cites Pichoff v. Bisso Towboat Co., 748 F.2d 300 (5th Cir,1984), and Richendollar v. Diamond M Drilling Co., 784 F.2d 580 (5th Cir.1986), for the proposition that some standard other than Scindia applies.[8] Pichoff involved the

8. We do not address Levene's citation to Richendollar, as the panel's finding of § 905(b) vessel negligence was overturned by this court sitting en banc. Richendollar v. Diamond M. Drilling Co., 819 F.2d 124 (5th Cir.), cert. denied, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987).

negligence of the defendant's general manager in giving a worker an inadequate flashlight rather than a drop light so that the worker could inspect the vessel's fuel tanks, and in ordering him to perform his work hurriedly so that the company would not lose money. The court found that only the order to hurry the work constituted vessel negligence, because this order forced the employee to work under dangerous conditions on the vessel itself. The court did not discuss Scindia in determining what acts of the owner-employer could have constituted negligence, but we think our later decision in Castorina does not leave any room for the broad-based duty Levene urges.

[9] It is true that Pintail may be held liable for injury caused by hazards under control of the tug. In Helaire v. Mobil Oil Co., 709 F.2d 1031 (5th Cir.1983), we stated that "the owner has a duty to avoid exposing longshoremen to harm 'from hazards under the act or control of the vessel.' " Id. at 1036 (citing Scindia, 451 U.S. at 167, 101 S.Ct. at 1622); see also Masinter, 867 F.2d at 897. However, we do not view the fleeting contact between Pintail and the BB-242 as the kind of control that could result in a finding of liability. We faced a similar situation in Ducote v. International Operating Co. of La., inc., 678 F.2d 543 (5th Cir. 1982). In that case, an employee injured while preparing a barge for cleaning sued both the actual owner of the barge and the company temporarily operating it while it was in for cleaning. Like Levene, Ducote argued that the temporary operator was its owner pro hac vice, and thus liable to him under the LHWCA. We rejected this attempt to characterize a limited contact as "control" for the purposes of Scindia duties, and held that "although [the cleaning company's] tug did move the barge upon which the accident occurred, this movement 'was in connection with its obligation to the owner for cleaning and loading of the vessel. Those incidental operations certainly do not make [the cleaning company] the owner pro hac vice.'" Ducote, 678 F.2d at 545.

The cases in which we have found such control by the vessel owner as to impose a duty generally have involved dangerous conditions on the owned vessel itself. In Masinter,

we found that the vessel owner's crew was "solely responsible" for placing a stairway which resulted in injury to an independent contractor aboard the vessel. This level of control placed the owner under "a continuing duty of care to those aboard the vessel." 867 F.2d at 897. In Theriot, we found that the owner of a drilling barge controlled a concentration of drilling mud in the work area, on which an independent contractor slipped and fell. 783 F.2d at 535.[9] Levene, by contrast, asks us to deem Pintail in control of the BB-242, and thus to impose a duty to protect against unreasonably dangerous conditions. In light of the fact that Pintail had contact with the BB-242 for only a short time and only by chance as part of an operation to free another barge, we cannot do so.

We reach the same result as in Ducote today. Although Captain Herbert temporarily was in "command" of both the SUTTON and the BB-242, this did not give Pintail constructive control over the work area of the barge and did not give rise to the degree of control we think Scindia requires before liability can attach. There was no evidence that Pintail had any responsibility for the condition of the deck of the BB-242. Pintail therefore was under no duty to make any inspection or use ordinary care to ensure that the BB-242 was free of unreasonable hazards.

The district court found, from the testimony of Captain Hebert, that the SUTTON had been inspected and was deemed to be a safe vessel prior to the commencement of the day's operations. Furthermore, the court found that nothing changed the condition of the SUTTON before Pintail's employees engaged in the linehandling operation. The accident occurred not as the result of any defect in the SUTTON, but at best was the result of a series of employment decisions. All the missteps Levene cites, from the decision to continue working despite the adverse weather conditions to the placement of the spotlight in the middle of the BB-242 must be

9. See also Turner v. Costa Line Cargo Services, Inc., 744 F.2d 505, 508-09 (5th Cir.1984); Walker v. Blacksea S.S. Co., 637 F.2d 287, 292-93 (5th Cir. 1981).

classified as potential acts of employer negligence. not vessel negligence.[10] The district court's findings concerning Pintail's lack of negligence in its capacity as vessel owner are essentially factual in nature, and must be upheld unless clearly erroneous. Lormand, 845 F.2d at 543 & n. 9. We do not find them to be such.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgement of the district court.

10. Of course, we express no opinion on whether these acts actually were negligent, as employer negligence is irrelevant under the LHWCA. The important point here is that these were acts of the employer, and are not the kind of acts that can be classified as vessel negligence.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LESTER LEVENE, et al.

CIVIL ACTION NO. 87-0104

-vs-

SECTION "O" (JUDGE LITTLE)

PINTAIL ENTERPRISES, Inc.,
et al.

OPINION

This action arises out of an accident in which Lester Levene, an employee of Pintail Enterprises, Inc. ("Pintail"), was injured when he slipped and fell while attempting to cross a barge during a line-handling operation. Levene and his wife brought suit against Pintail, owner of the tugboat known as the M/V SUTTON, and Broussard Brothers, Inc. ("Broussard"), owner and operator of the barges known as BB-242 and BB-243. Subsequently, Scottsdale Insurance Company and Certain Underwriters at Lloyd's of London were added as defendants. A bench trial was conducted on 20 November 1989. After consideration of the pleadings, testimony, and evidence, the court makes these findings of fact and conclusions of law.

Findings of Fact

On 7 February 1986, Lester Levene, an employee of Pintail, injured his knee when he slipped on the deck of a barge. At the time of the accident, Levene was assisting Kevin Warner, a co-employee, complete a line-handling operation on the barge. Although Levene was employed primarily as a heavy equipment operator, he also engaged in roustabout activities and cement work when Pintail needed his assistance.

On the morning of the accident, Preston Hebert, a Pintail employee, inspected the M/V SUTTON, a vessel chartered and operated by Pintail. The inspection revealed that the SUTTON was staunch and fit for its intended voyage. Shortly thereafter, Hebert, who was also captain of the SUTTON, Levene and Warner boarded the SUTTON enroute to the Inexco drilling site to perform their daily work.

After these Pintail employees discharged their duties at the Inexco field, Hebert was instructed to proceed to Broussard Brothers, a barge facility in Intracoastal City, Louisiana, to pick up another barge for the next day's work.

While the SUTTON made its way to Broussard Brothers, night fell and it started raining. Upon arriving at Broussard Brothers, Hebert, Warner and Levene commenced their search for a barge known as the BB-243. At this time, the rain was steady, the wind was blowing, and there was thunder and lightning.

To facilitate the search by illumination of the area, Captain Hebert used one of the SUTTON's spotlights. Although there were two spotlights aboard the SUTTON, only one of these spotlights was operational. The main purpose for using the spotlight was to assist Levene and Warner in finding the BB-243. Hebert operated the spotlight from the wheelhouse. The Pintail employees found the BB-243 situated behind the BB-242 and beyond the SUTTON's reach. The BB-242 and BB-243, both approximately 120 feet high in length and 30 feet in width, were flatbed barges, with their decks sitting three feet above the water line.

To obtain control over the BB-243, it was necessary to untie the BB-242 and move it out of the way. To accomplish

this, Captain Hebert positioned the SUTTON's bow against the broad side of the BB-242 so that the vessel was perpendicular to the barge. Warner and Levene were then instructed to go to the mooring bits on opposite ends of the BB-242 and untie the lines in order to release the BB-242 from the BB-243. Hebert aimed the spotlight directly down the middle of the BB-242 to assist Levene and Warner in the line-handling operation. Due to the positioning of the barge and vessel, lighting was adequate in the middle, but dim on the extreme right and left ends of the barge.

Despite the continuing rain and poor visibility, the Pintail employees proceeded with the line-handling operation. Levene and Warner could see a variety of objects, including oilfield equipment and scrap material on the deck of the BB-242. Levene left the SUTTON intending to reach the mooring bit in the far right corner of the barge. However, he was forced to walk toward the rear right corner of the BB-242 because several obstructions on the barge prevented him from proceeding directly to his intended destination. After finding a clear route, Levene changed his course and walked directly toward the far right mooring bit. Levene chose this route despite the presence of scrap material and grease in his path. Half way to the mooring bit, Levene slipped and fell to the deck of the barge injuring his knee. Despite this injury, Levene untied the mooring lines, returned to the SUTTON, and told Captain Hebert about the accident. Two days later, Levene reported the accident to Pintail.

Conclusions of Law

This action has been brought under the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. ("LHWCA" or "Act"). Accordingly, this court has jurisdiction pursuant to 28 U.S.C. § 1331.

To recover under LHWCA, a person must be engaged in "maritime employment" and injured on a "maritime situs." 33 U.S.C. § 903; Northeast Marine Terminal v. Caputo, 432 U.S. 249, 265, 279 (1977). A literal reading of the Act indicates it is applicable to traditional "longshoreman" and

"harbor workers" engaged in maritime employment. See 33 U.S.C. § 902(3). The Fifth Circuit has held that the LHWCA umbrella covers independent contractors and their harbor worker employees while working aboard vessel. Hill v. Texaco, 674 F.2d 447, 451 (5th Cir. 1982).

Under LHWCA, an injured worker is entitled to recover compensation benefits from his employer. 33 U.S.C. § 904. The LHWCA also permits an injured worker to bring a separate action against the vessel owner for vessel negligence. 33U.S.C. § 905(b). Typically, an injured longshoreman or harbor worker recovers compensation against his employer, and then brings a separate action for negligence against a separate vessel owner. Occasionally however, a LHWCA employer conducting stevedoring or other maritime related operations is also the vessel owner. Under such circumstances, an injured worked may bring suit against his employer "qua vessel" under 33 U.S.C. § 905(b) for injuries arising out of the vessel's negligence. Taylor v. Bunge Corp., 845 F.2d 1323, 1327-28 (5th Cir. 1988); White v. Cooper/T. Smith Corp., 690 F. Supp. 534, 538 (E.D. La. 1988). thus, a LHWCA employer who acts in such a dual capacity can only be held liable for negligence in its capacity as the vessel owner. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 531 n. 6 (1983); Kerr-McGee v. Ma-Ju Marine Services, Inc., 830 F.2d 1332, 1339 (5th Cir.), reh'g denied, 835 F.2d 288 (5th Cir. 1987); Tran v. Manitowoc Engineering Co., 767 F.2d 223, 226 (5th Cir. 1985). The employer retains statutory immunity for any negligence it commits in its role as the injured worker's employer. 33 U.S.C. § 905(a); Castorina v. Lykes Bros. S.S. Co., Inc., 758 F.2d 1025, 1033 (5th Cir.), cert. denied, 474 U.S. 846 (1985).

Levene asserts that Pintail has vessel negligence for (1) failing to illuminate properly the work area on the BB-242, (2) failing to clear a path on the barge or warn Levene about the hazardous condition on the barge, (3) creating a hazardous condition on the barge, and (4) forcing Levene to work in bad weather, causing him to perform hastily his duties in an uncareful manner. On the other hand, Pintail contends that it is statutorily immune from suit under LHWCA for any acts of negligence committed in its capacity as Levene's em-

ployer. Under 33 U.S.C. § 904, a longshoreman or harbor worker who suffers an injury that arises out of his employment is entitled to recover compensation from his employer regardless of whether the injury was caused by the employer's negligence. Jones & Laughlin Steel, 462 U.S. at 528-529; See also Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 1050 (5th Cir. 1983) (quoting Voris v. Texas Employers Insurance Association, 190 F.2d 929, 934 (5th Cir.), cert. denied, 342 U.S. 932 (1951)). Any liability incurred by an employer under 33 U.S.C. § 904 "shall be exclusive and in place of all other liability of such employer to the employee..." 33U.S.C. § 905(a).

In the case at bar, Levene was a Pintail employee injured while discharging his duties for Pintail. Clearly, Levene's injury occurred in the course of his employment. Therefore, Pintail, as Levene's employer, is only liable for LHWCA compensation and is statutorily immune from liability for the acts of negligence alleged by the plaintiff.

More importantly, Pintail contends that it cannot be held liable as owner of the SUTTON for Levene's injuries because none of the alleged acts constitutes vessel negligence. The Fifth Circuit has held that the duties owed by a shipowner to a longshoreman under 33 U.S.C. § 905(b) are those set forth by the United States Supreme Court in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981). Castorina v. Lykes Bros. S.S. Co., Inc., 758 F.2d 1025, 1033 (5th Cir. 1985). Under Scindia, a vessel owner has a duty to furnish a safe vessel and to warn a stevedore about any concealed defects in the ship's equipment or stevedore's work area reasonably known to the owner. Id. at 167. Furthermore, the shipowner has no general duty to supervise a stevedore or inspect the vessel after stevedoring operations are in progress unless a law, custom, or contractual provision to the contrary exists. Id. at 172. A vessel owner has a duty intervene if it learns that a dangerous condition arose in the stevedoring risk of harm due to the stevedore's "obviously improvident" actions. Id. at 175. Under this last duty, a shipowner can be held liable only if it had actual knowledge of both the dangerous condition and the stevedore's unreasonable actions in dealing with the danger. Helaire v. Mobil

Oil Co., 709 F.2d 1031, 1038-39 (5th Cir. 1983).

Pintail asserts that it did not breach its Scindia duties, and cannot be held liable for negligence under 33 U.S.C. § 905(b). First, Captain Hebert testified at trial that he inspected the M/V SUTTON before the Pintail crew embarked on its mission to the Inexco drilling site. Hebert ensured that hand lanterns were available to Pintail's employees and that at least one of the SUTTON's two spotlights was operational. Overall, Captain Hebert's inspection revealed that the SUTTON was a safe vessel on the day Levene was injured. Nothing in the record indicates that the SUTTON's condition changed while in operation prior to the time it was turned over to Pintail's employees at the Broussard Brother's facility. Therefore, this court concludes that Pintail, as owner of the SUTTON, satisfied its obligation provide its employees with a safe ship. In addition, since there were no hidden hazards aboard the SUTTON about which Pintail had actual or constructive knowledge, Pintail did not breach its duty to warn its employees of such danger.

Pintail turned the SUTTON over to its own employees, just as a shipowner turns its vessel over to a stevedore, when the SUTTON arrived at the Broussard Brothers facility and the line-handling operation commenced. Captain Hebert, Warner, and Levene began the line-handling operation in inclement weather after locating the BB-243 and positioning the SUTTON next to the BB-242. Pintail, as vessel owner, correctly relied upon its employees to perform the line-handling operation and had no duty to supervise their work or inspect the SUTTON after the line-handling operation commenced. This conclusion is buttressed by the fact that the line-handling operation was performed almost exclusively on the BB-242 and not on the SUTTON.

Pintail also did not breach its limited duty under Scindia to intervene. The scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which the stevedore is assigned. In the instant condition and provided adequate lighting throughout the job. The deck of the SUTTON appeared to be safe enough for Levene and Warner to proceed toward the BB-242. Clearly, the actions of Pintail's employees on the

SUTTON, including Hebert's operation of the spotlight, were not so obviously improvident as to present an unreasonable risk of harm to the employees during the line-handling operation. Furthermore, the fact that Levene's injury occurred on the BB-242, and not on the SUTTON, supports the conclusion that no duty to intervene arose.

This court holds that Pintail, as owner of the M/V SUTTON, did not breach any of the duties dictated by Scindia. Therefore, Pintail is completely exonerated from liability under 33 U.S.C. § 905(b). We also find no liability on the part of Broussard Brothers, Inc. No negligence has been proved that the mere parking of a barge whose oily decks supported used oilfield equipment is a negligent activity by Broussard Brothers.

Accordingly, Levene's complaint against Pintail is DISMISSED.

An appropriate judgement will issue.

Alexandria, Louisiana.

8 February 1990.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LESTER LEVENE, et al.

CIVIL ACTION NO. 87-0104

—vs—

SECTION "O" (JUDGE LITTLE)

PINTAIL ENTERPRISES, Inc.,
et al.

JUDGMENT

For written reasons assigned this date, the plaintiffs' claims against all defendants are DISMISSED with prejudice.

Alexandria, Louisiana.
8 February 1990.

F. A. LITTLE, JR..
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 21st day of January, 1992.

JOHN E. McELLIGOTT, JR.

JAMES C. LOPEZ

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 91-1576

In The

Supreme Court of the United States

October Term, 1991

LESTER LEVENE, SR. and SHIRLEY LEVENE,

Plaintiffs-Petitioners

and

AMERICAN CASUALTY INSURANCE COMPANY,

Intervenor-Petitioner

versus

PINTAIL ENTERPRISES, INC., LLOYDS OF LONDON, and SCOTTSDALE INSURANCE COMPANY,

Defendants-Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS PINTAIL ENTERPRISES, INC. AND LLOYDS OF LONDON

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QUESTIONS PRESENTED FOR REVIEW

1) Petitioner, Respondents' employee covered under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.*, sued Respondent for vessel owner liability. Respondent is the owner of the Tug SUTTON. Is *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614 (1981) the correct standard by which to judge Respondent's liability as owner of the Tug SUTTON?

2) Petitioners settled with Broussard Brothers, the owner of the barge on which Petitioner was allegedly injured. Petitioner seeks to impose vessel owner status on Respondent for the barge. Is the vessel owner liability recognized under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), limited to vessel owners as defined by 33 U.S.C. §902(21)?

LIST OF ALL PARTIES

The undersigned, counsel of record for Defendants – Respondents, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1.

Lester Levene, Sr. and Shirley Levene
Plaintiffs – Petitioners

2.

John E. McElligott, Jr. and Philip A. Fontenot
Davidson, Meaux, Sonnier, McElligott & Swift
Attorneys for Plaintiffs – Petitioners
Lester Levene, Sr. and Shirley Levene

3.

Pintail Enterprises, Inc. and Lloyds of London
Defendants – Respondents

4.

James R. Sutterfield, Campbell E. Wallace,
Steven E. Psarellis
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Attorneys for Defendants – Respondents

5.

Scottsdale Insurance Company
Defendant – Respondent

LIST OF ALL PARTIES – Continued

6.

H. Evans Scobee
Durrett, Hardin, Hunter, Dameron & Fritchie
Attorney for Defendant – Respondent
Scottsdale Insurance Company

7.

American Casualty Insurance Company
Intervenor – Petitioner

8.

John R. Walker, James C. Lopez
Guglielmo, Lopez, Tuttle & Walker
Attorney for Intervenor – Petitioner
American Casualty Insurance Company

9.

Lee Bernard
Owner of the vessel, M/V Sutton

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STATEMENT OF JURISDICTION

This Court has no jurisdiction because the Petition for Writ of Certiorari ("Writ") was not timely filed. Respondents refer to Argument I, *infra*, for a complete discussion of this jurisdictional issue.

Petitioners fail to identify any jurisdictional basis for this Court. However, if the defects noted above are not fatal, jurisdiction under 28 U.S.C. §1254(1) appears proper. Petitioners seek review of a judgment rendered in a case from the United States Court of Appeals for the Fifth Circuit.

CONCISE STATEMENT OF THE CASE

In their Writ, petitioners[1] refer to apparently edited, materially incomplete reproductions of the lower court opinions, and fail to cite any evidence in the record to support their statements of fact. Further, petitioners' Statement of the Case omits critical evidence on which the district court and appellate court relied in finding that respondents[2] were not negligent. A discussion of the facts material to the case demonstrates the lack of merit of petitioners' Writ.

---

[1] Lester Levene, Sr., Shirley Levene and intervenor American Casualty Insurance Company (hereinafter "Petitioners" or "Levene").

[2] Pintail Enterprises, Inc. and Lloyd's of London (hereinafter "Respondents" or "Pintail").

On the day of the accident, the tug SUTTON[3] was used by Pintail to push a barge with land-based heavy equipment to an oil well located in the marshes where Levene operated the equipment to conduct repair operations. (Appendix pages (hereinafter "App.") 72-77.) At the end of the work day, Pintail determined it needed another barge the next day, and hired the BB243 from Broussard Brothers, Inc. ("Broussard"). (App. 74-75.) The tug then proceeded to Broussard's fleeting facility in Intracoastal City, Louisiana. (App. 76-78.)

When the SUTTON arrived at the Broussard fleet, Levene searched for the BB243 among the barge tiers by walking on various barges without a flashlight or the spotlight on him. (App. 78-82; App. 85-86.) After a brief search, the BB243 was located directly inshore of another barge which Levene identified as the BB242. (App. 85-89.) The BB242, the court found, was owned and operated by Broussard.[4] The mooring lines of the offshore barge, BB242, had to be released in order for the SUTTON to make up to the BB243. (App. 11-12.)

The SUTTON's spotlight was reasonably safe, and in good working order throughout the day of the accident. (App. 98-100.) The single spotlight was directed in the middle of the barge BB242 throughout the barge shifting operation in accordance with good marine practice. (App. 99-102.)

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[3] The SUTTON was a small inland tug owned by Lee Bernard and bareboat chartered by Pintail. (App. 13, n.2.)

[4] Levene also sued Broussard for its negligence, as owner of the BB242, but settled his claims against it. (App. 1; App. 13 n.3.)

Levene and his co-employee, Kevin Warner, walked from the tug, positioned in the middle of the barge BB242, to opposite ends of the barge to untie the lines. (App. 82-85.) After walking from the center of the BB242 to the end, Levene walked across the far end toward the mooring lines between the barges. As he turned and walked toward the center of the BB242, he felt comfortable that he had enough light and could safely see what he needed to see in order to cross some scrap material ahead of him. (App. 89-90.) He claims he sustained an injury to his right knee when the scrap material on which he was walking moved. (App. 92-93.)

Levene concedes that he had sufficient light to see the scrap while the SUTTON's spotlight was trained in the middle of the BB242 and was not shining directly on his path. (App. 89-90.) Levene never complained about the lack of lighting. He never asked or directed the spotlight be trained on his path or requested a hand light which was aboard the SUTTON. (App. 90-92.)

Pintail had only a transitory connection with the barge BB242 when it shifted it out of the way in the Broussard fleet on the night of the accident. (App. 25.) There was no competent evidence that Pintail had any prior knowledge about the barge BB242, or the scrap material on it, prior to the SUTTON coming alongside of it. (App. 65-66.) Kevin Warner, a co-employee of Levene, claims that he had helped load the barge a few days earlier. His identification of the barge lacks credibility inasmuch as his work records clearly show he was not a Broussard's fleet loading any barges for over a month before the accident. (App. 55-59.) Additionally, Kevin Warner gave a prior inconsistent statement less than a

year following the accident wherein he admitted he had no knowledge who loaded the equipment and scrap material on the barge. (App. 69-72.) There was no evidence Pintail had any responsibility for the condition of the deck of the BB242. (App. 25.)

When the SUTTON came alongside the offshore barge BB242, Preston Hebert, a Pintail employee designated captain, fixed the tug's spotlight across the middle of the barge (App. 59-60.), and ascertained the presence of some equipment in the middle of the barge (App. 59-60; App. 62-63.) and a clear path along the outside perimeter on the side of the barge adjacent to the tug. (App. 66-67.) Hebert had no knowledge of the presence, much less the condition, of scrap material on the barge along Levene's intended path on the far end of the barge. (App. 60-62; App. 66-69.) Hebert understood the barge had been loaded with an open area around its entire perimeter. (App. 62-64.) There is no evidence that Hebert, or any other Pintail employee, knew that Levene might walk on any scrap materials or that the materials may have been in Levene's path.

The wet scrap material on which Levene supposedly fell did not present an unreasonably dangerous condition to an experienced worker like Levene. (App. 96-97.) As Levene's own expert testified, neither the SUTTON nor the barge BB242 on which Levene fell presented any unreasonably dangerous conditions. (App. 93-95; App. 96-97.)

SUMMARY OF ARGUMENT

I.

Petitioners' brief should be dismissed as untimely and otherwise not in compliance with the Supreme Court Rules. Petitioners filed their Petition no earlier than January 20, 1992, more than 90 days following the appellate court's decision of September 19, 1991. Petitioners presumably rely upon their Suggestion for Rehearing *in banc* pursuant to Rule 35 to extend the time for filing their petition which is contrary to the Rules of this Court.

II.

Petitioners fail to identify any real conflict among the circuits or other legal basis to suggest that this Court should entertain this matter. Petitioners argue that the negligence standards under 33 U.S.C. §905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (hereinafter "LHWCA"), set forth in *Scindia Steamship Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1641 (1981), and its progeny are not strict enough and should be changed from negligence to some higher standard akin to unseaworthiness or the Jones Act, 46 U.S.C. §688, "slightest negligence" standard. Contrary to express Congressional enactments, Petitioners also seek to expand a vessel owner's responsibility for conditions on the BB242, a vessel it did not own, charter or operate. The BB242 was owned and operated by a co-defendant with whom the Petitioners settled before trial. *Scindia* and the LHWCA clearly enunciate the substantive standards applicable to Respondents. The district and appellate courts' application of these standards was

consistent with *Scindia* and the LHWCA. Petitioners' complaint with the lower courts' factual findings do not justify granting this Writ.

ARGUMENT

I.

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") entered judgment on September 19, 1991. (App. 29.) The petitioners filed a Suggestion For Rehearing under Federal Rules of Appellate Procedure, Rule 35, on October 1, 1991 (App. 30, 36.) Levene specifies, in the first line of the Statement of the issue of the Rule 35 Suggestion For Rehearing, that the request is made "[p]ursuant to the provisions of Rule 35 of the Federal Rules of Appellate Procedure,. . . . " (App. 36.) A suggestion pursuant to Rule 35(b) is not a petition for rehearing for purposes of Supreme Court Rule 13.4.[5] Accordingly, the time for filing the Petition for Writ of Certiorari runs from the date of the appellate decision, September 19, 1991, and not from denial of the Suggestion for Rehearing *in banc*.

An appellate court's handling of the Rule 35 suggestion does not extend the time for filing Levene's Writ. Supreme Court Rule 13.4. Ninety days after September

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[5] The Fifth Circuit's Minute Entry of October 25, 1991, might suggest a Petition For Rehearing under F.R.A.P. 40 had been filed by petitioners. However, the petitioners' own pleading demonstrates that no Petition for Rehearing under Rule 40, was ever filed in this matter. (App. 30.)

19, 1991 was December 18, 1991. By any count, the 90 day period expired long before petitioners' first attempt at filing their Petition for Writ of Certiorari on January 20, 1992.

Supreme Court Rule 13.1 provides:

> [a] petition for a writ of certiorari . . . shall be deemed in time when it is filed . . . within 90 days after the entry of the judgment.

Supreme Court Rule 13.4 provides:

> The time for filing a petition for a writ of certiorari runs from the date the judgment . . . is rendered, and not from the date of the issuance of the mandate . . . However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. *A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b). Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.* [Emphasis added]

The rule governing Petitions for Rehearing is Federal Rules of Appellate Procedure, Rule 40. This Court's rules make a clear distinction between a "Petition for Rehearing" and a "Suggestion for Rehearing *in banc*." Supreme Court Rule 13.4's clear wording states that a Suggestion for Rehearing *in banc* pursuant to Rule 35(b) is not equivalent to, nor is it to be deemed to be, a Petition for Rehearing. Petitioner's specific designation of its application as a "Suggestion for Rehearing *en banc*" on the title page, and the specific reliance on the rights and benefits

provided under Rule 35 in the opening statement of the suggestion make it crystal clear that petitioners sought relief under Rule 35, not Rule 40.

This Court recently addressed the difference between Rule 35 and Rule 40 relief in *Missouri v. Jenkins*, 495 U.S. 33, 110 S.Ct. 1651 (1990):

> We deal first with the question of our own jurisdiction. Title 28 U.S.C. §2101(c) (1982 ed.) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits.
>
> . . .
>
> *But as respondents point out, it has also been our consistent practice to treat suggestions for rehearing in banc presented to the United States Courts of Appeals that do not also include petitions for rehearing by the panel as not tolling the period for seeking certiorari. Our Rule 13.4 now expressly incorporates this practice.* See n. 13, *supra*. This practice rests on the important distinction between "petitions for rehearing," which are authorized by Rule 40(a) of the Federal Rules of Appellate Procedure, and "suggestions for rehearing in banc," which are permitted by Rule 35(b).
>
> . . .
>
> FN17. Rule 35(c) explicitly states that the pendency of a suggestion for rehearing in banc shall not "affect the finality of the judgment of the court of appeals or stay the issuance of the mandate." . . .

Missouri v. Jenkins, 495 U.S. 33 at 45-48, 110 S. Ct. 1651, at 1660-1661 (1990). In *Missouri*, this Court looked to the local rules in addition to the Federal Rules of Appellate Procedure to determine the nature of the pleading. The Local Rule 35.2 of the United States Court of Appeal for the Fifth Circuit governing Suggestions for Rehearing *in banc* states:

> . . . *The suggestion shall not be incorporated in the petition for rehearing* before the panel, if one is filed, but shall be complete in itself. In no case shall a suggestion of en banc consideration adopt by reference any matter from the petition for panel rehearing or from any other briefs or motions in the case. . . . "

In view of the specific rules of this Court, the Fifth Circuit, and the specific designation by the petitioners in their submission to the Fifth Circuit, the delay for application for Writs commenced on September 19, 1991.

Levene neither requested nor obtained any extension of time to file a petition for a writ of certiorari from the Court, or any Justice of the Court, as permitted under Supreme Court Rule 13.2. Any such request at this time would be improper and untimely. Supreme Court Rule 30.2. Therefore, Levene's Petition for a Writ of Certiorari is untimely and should be dismissed.[6]

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[6] Petitioners' brief contains other defects. Petitioners fail to identify any jurisdictional basis for review by the Supreme Court. The jurisdictional statute identified provides only federal district court jurisdiction.

(Continued on following page)

II.

Petitioners present no issue justifying this Court's exercise of its discretionary review of appellate decisions. Supreme Court Rule 10 sets forth specific guidelines to identify issues of sufficient importance to justify this Court's review by certiorari. Petitioners have failed to identify any true conflict or departure from accepted or usual course of judicial proceedings. Petitioners identify no important unsettled questions of federal law.

A.

BACKGROUND

1.

THE STATUS OF LEVENE

In a maritime case, the legal status of the injured party determines the substantive rights available to that party. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 n.9, 79 S. Ct. 406, 410, n.9 (1959). Section 905(b) is the exclusive tort remedy available to an LHWCA employee suing a vessel owner. 33 U.S.C. §905(b). Under Section 905(b). Under Section 905(b), an LHWCA employee may only recover against the "vessel" for its negligence which causes an injury.

(Continued from previous page)

Supreme Court Rule 14.1(a) requires a short and concise statement of the issue. Petitioners have included argument contrary to this Court's rules. Petitioners have not notified the respondents of the date of filing and the docket number as required by Supreme Court Rule 12.1, as of this date.

Levene states in his Writ that he was injured "while working as a longshoreman." (Writ, p. 1.) Nonetheless he claims that the issue before the Court is whether a vessel owner owes any duty to its non-stevedore employee and/or passenger (presumably himself). (Writ, p. 1.) To avoid any confusion, Levene was a worker covered under the LHWCA[7], whose substantive rights are determined by the LHWCA.

Levene spent ninety-five percent (95%) of his employment with Pintail working on land as a heavy equipment operator. (App. 102-end.) At the time of his accident, Levene was engaged in "maritime employment" on a Pintail tug and was allegedly injured on a "maritime situs." 33 U.S.C. §§902 and 903. Whether he is termed a "longshoreman" or "harbor worker,"[8] Levene was an employee covered by the LHWCA at the time of his accident. As an LHWCA employer, Pintail paid Levene compensation and medical benefits in return for, among other things, immunity from tort suit by its employees. 33

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[7] App. 13, n.3; App. 21, n.7.

[8] The Fifth Circuit and other circuits have uniformly held that a "harbor worker" and a "longshoreman" have the same legal status under the LHWCA in their §905(a) negligence claims against a vessel owner. *Hill v. Texaco, Inc.*, 674 F.2d 447, 431 (5th Cir. 1982); *Lormand v. Superior Oil Co.*, 845 F.2d 536 (5th Cir. 1987), *cert. denied*, 484 U.S. 1031, 108 S. Ct. 739 (1988); *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir. 1989), *modified on other grounds*, 929 F.2d 191 (5th Cir. 1991); *Peters v. Titan Nav. Co.*, 857 F.2d 1342 (9th Cir. 1988); *Cook v. Exxon Shipping Co.*, 762 F.2d 750 (9th Cir. 1980); *Roach v. M/V AQUA GRACE*, 857 F.2d 1575 (11th Cir. 1988).

U.S.C. §905(a). (App. 14.) The only exception to this statutory immunity is when an employer acts in a "dual capacity" as an LHWCA employer and a vessel owner, in which case the entity may be sued *qua vessel* for acts of "vessel" negligence which injure a covered employee. *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523, 532, 103 S. Ct. 2541, 2548 (1983). Levene has a tort claim against Pintail for its alleged negligence *qua vessel* pursuant to Section 905(b), but this " . . . tort remedy for vessel negligence is a limited exception to the general structure of the LHWCA, which, like state workers compensation schemes, generally replaces negligence causes of action against employers with a system of predetermined, standardized benefits." (App. 15.)

When Congress enacted Section 905(b), it rejected the notion that a vessel owner had a nondelegable duty to provide an LHWCA worker a safe place to work, including any unseaworthiness remedy. *Scindia*, 451 U.S. at 172, 101 S. Ct. at 1624; 33 U.S.C. §905(b). Congress reasoned that the increase in LHWCA compensation and medical benefits to the employee was fair consideration for the employee's loss of his unseaworthiness remedy. *Scindia*, 451 U.S. at 165, 101 S. Ct. at 1621. Therefore, Levene's claims that Pintail is strictly liable under the LHWCA for alleged unseaworthy conditions on someone else's vessel, much less a vessel like the BB242 owned by a settling defendant, are without merit.

Levene also sued Pintail under the Jones Act, 46 U.S.C. §688. The Jones Act claims were dismissed upon summary judgment which Levene did not appeal. (App. 13; App. 21, n.7.) It is, therefore, undisputed that Levene is not entitled to any Jones Act remedies.

In his Writ, Levene, for the first time, claims that he had the legal status of a "passenger" and that Pintail owed him the same duties it would owe a non-employee if Pintail were in the business of carrying passengers for hire aboard a vessel. At this juncture, Levene is precluded from raising the question of "passenger" status on appeal[9] even if there were any merit to this argument.[10]

Levene is a covered employee under the LHWCA who had an on-the-job accident. His exclusive tort remedy against Pintail *qua vessel* is Section 905(b) of the LHWCA. 33 U.S.C. §905(b); *Jones & Laughlin*, 462 U.S. at

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[9] *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, at 2921 (1989); *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 109 S. Ct. 998, at 1003, n.2 (and cases cited therein) (1989); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, at 1414 (9th Cir. 1991); *Continental Technical Services, Inc. v. Rockwell Intern. Corp.*, 927 F.2d 1198, at 1199 (11th Cir. 1991).

[10] "A passenger is one who travels in a public conveyance by virtue of a contract with the carrier, express or implied, paying fare or something accepted as an equivalent therefore," *The Vueltabajo*, 163 Fed. 594, at 596 (S.D. Ala. 1908). *See* also *The City of Panama v. Phelps*, 101 U.S. (11 Otto) 453, at 462-3 (1880); *Carnival Cruise Lines, Inc. v. Shute*, ___ U.S. ___, 111 S. CT. 1522 (1991).

Levene was not a passenger on the SUTTON. Levene did not pay for the passage. Pintail was not a common carrier. Levene was an employee of Pintail and was engaged in the course and scope of his employment while on the SUTTON. Levene meets none of the tests for being a "passenger." Even if he were a passenger, the lower courts' findings would not support a finding of liability against Pintail. *See: Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (5th Cir. 1990); *Peters v. Titan Nav. Co.*, 857 F.2d 1342 (9th Cir. 1988).

532, 103 S. Ct. at 2548. The fact Levene rode on the SUTTON does not transform him from an LHWCA employee to a passenger as petitioners assert. *Reynolds v. Ingalls Shipbuilding Division*, 788 F.2d 264, 271, n.8 (5th Cir.), *cert. denied*, 479 U.S. 885, 107 S. Ct. 278 (1986) [a worker does not cease to be covered by the LHWCA merely because he is not performing his usual duties at the time of injury.]

2.

THE VESSELS

Levene's accident occurred on the barge BB242, a flatbed barge measuring approximately 120 feet long and 30 feet wide. (App. 12, n.1.) Levene claims he slipped on oilfield equipment and scrap material that he encountered on the deck of the barge.

The barge BB242 was owned by Broussard, the party who was the "vessel" under the LHWCA and the person responsible for the condition of the barge. Pintail's only connection with the BB242 was when it had to temporarily shift the barge out of the way to retrieve another barge inshore of the BB242. (App. 24.) The LHWCA limits a Section 905(b) negligence claim to a "vessel" which is defined as:

> . . . any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, *and said vessel's* owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. §902(21). Pintail did not own, operate or charter the BB242, and could not, as a matter of law, be the "vessel" with respect to the barge BB242 simply by moving it out of the way.

Pintail bareboat chartered the SUTTON, and was the "vessel" under §902(21) with respect to the SUTTON. Pintail was not responsible under §905(b) for any other craft because it did not meet the requisite status set forth by Congress in §902(21).

B.

PINTAIL'S ALLEGED NEGLIGENCE

1.

PINTAIL'S ALLEGED ACTS OF NEGLIGENCE AS EMPLOYER

Pintail occupied a "dual capacity" with respect to Levene. *Jones & Laughlin; Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985). As an LHWCA employer, Pintail had the duty to provide Levene a safe place to work, 33 U.S.C. §941, and specifically to provide flashlights and proper illumination of the work area, 29 C.F.R. §1918.92(a)(c), keep the work areas free of any slippery conditions and tripping hazards, 29 C.F.R. §1918.91(a)(c)(d), and to protect employees from unsafe working conditions, such as unreasonably dangerous weather. This Court has stated in *Scindia* that the legal duties placed on the LHWCA employer by the Longshoring Regulations are the responsibility of the LHWCA employer, and that the vessel owner " . . . owes no such statutory duty to them [LHWCA employees]." *Scindia*, 451 U.S. at 170, 101 S. Ct. at 1623-1624.

2.

THE ALLEGED NEGLIGENCE OF PINTAIL QUA VESSEL

The Fifth Circuit squarely answered Levene's claims that Pintail was negligent in its capacity as a "vessel" under the LHWCA:

> The district court's findings concerning Pintail's lack of negligence in its capacity as vessel owner are essentially factual in nature, and must be upheld unless clearly erroneous. *Lormand [v. Superior Oil Co.*, 845 F.2d 536 (5th Cir. 1987), *cert. denied*, 484 U.S. 1031 (1988)], 845 F.2d at 543, n.9. We do not find them to be such.

(App. 35.) Both lower courts correctly applied *Scindia* and its progeny in concluding that Pintail was not negligent. There is no reason to disturb that finding, especially when petitioners' own expert testified there were no unreasonably dangerous conditions on the barge BB242 or the SUTTON. (App. 93-97.)

C.

THE ASSERTED CONFLICT AMONG THE CIRCUITS

Petitioners suggest that the Writ be granted to "resolve the conflict between the Ninth Circuit and the Fifth Circuit regarding whether a vessel owner owes a duty to passengers and/or maritime workers who are actually injured outside the confines of the vessel." (Writ, p.6.) Contrary to petitioners' suggestions, there is no conflict.

1.

THE NINTH CIRCUIT AUTHORITY

Levene claims that *Marshall v. Westfal-Larsen and Co.*, 259 F.2d 575 (9th Cir. 1958) should control substantive law for negligence claims by an LHWCA worker against a vessel.

Marshall involved an injury to a person who jumped from a ladder on a vessel side to a barge alongside the vessel. The district court found nothing wrong with the barge, and held the passenger 100% at fault. On appeal, the Ninth Circuit affirmed the district court's findings of fact and the substantive law which applied to claims by a passenger against a common carrier for hire.

Marshall has been cited with approval in two cases arising in the Fifth Circuit: *Tullis v. Fidelity and Casualty Co. of New York*, 397 F.2d 22, 23 (5th Cir. 1968) and *Counts v. Lafayette Crewboats, Inc.*, 622 F. Supp. 299 (W.D. La. 1983) [a case from the same district court in Louisiana as the case *sub judice*]. There is no real conflict between *Marshall* and any Fifth Circuit decision.

Marshall has nothing to do with the case *sub judice* other than the fact Levene and Marshall were both injured on barges and the vessel owners in each case were not found negligent. Otherwise, *Marshall* is clearly distinguishable:

1. Marshall was a passenger, not an employee of the vessel owner like Levene;

2. The vessel owner in *Marshall* was a common carrier for hire who owed its passengers the highest degree of care, not an LHWCA

employer like Pintail who owed a different, statutory duty;

3. The *Marshall* case was decided in 1958, over 14 years before the LHWCA 1972 Amendments and 23 years before this Court decided *Scindia*.

Marshall is neither binding nor persuasive authority with respect to a negligence claim under Section 905(b) brought by an LHWCA employee against a "vessel" under the LHWCA. Levene's suggestion that there is a conflict between the circuits is not well grounded in fact or law.

2.

THE LOWER COURTS' INTERPRETATION OF THE LHWCA AND SCINDIA

The Fifth Circuit's decisions which petitioners presumably believe are "in conflict" are the appellate decision in this matter (App. 10-27.) and the authorities relied upon in that decision. In reaching its decision, both the Fifth Circuit and district court applied the LHWCA in accordance with Supreme Court authority including *Scindia* and *Jones & Laughlin*. Both decisions are based upon well-established legal principles:

1. Under the LHWCA, a vessel owner's responsibility for conditions on a vessel is limited to the "vessel" he owned, chartered or operated within the meaning of 33 U.S.C. §902(21) and 33 U.S.C. §905(b).

2. Under *Scindia*, a vessel owner is responsible for unreasonably dangerous conditions under its "active control."

Pintail submits both lower courts correctly interpreted these duties owed by a vessel owner under the LHWCA and the reasonable care standard set forth in *Scindia*, and properly applied them in reaching their factual findings.

Pintail chartered the SUTTON and is, therefore, a "vessel" under the LHWCA with respect to that vessel. 33 U.S.C. §902(21). A Section 905(b) negligence claim is only available to an LHWCA employee for a suit against the "vessel":

> (b) In the event of injury to a person covered under this Act caused by the negligence of a *vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof may bring an action against such *vessel* as a third party in accordance with the provisions of section 33 of this Act. . . . The liability of the *vessel* under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. . . . The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

33 U.S.C. §905(b) (emphasis added). Pintail is only a "vessel" with respect to the SUTTON, as it was the only vessel Pintail owned, chartered or operated.

Under *Scindia*, Pintail had a duty to exercise ordinary care with respect to the SUTTON:

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its

> cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. (Citation omitted.) The shipowner thus has a duty with respect the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

Scindia, 456 U.S. at 166, 101 S. Ct. at 1622. Both the district court and the appellate court held that the Pintail satisfied all of its duties to Levene under *Scindia* with respect to the SUTTON.

The Fifth Circuit declined to alter the LHWCA and require a shipowner to protect against hazards, i.e., unreasonably dangerous conditions, arising on an "other" vessel. (App. 25.) A property owner is generally not liable for an injury on his neighbor's property caused by a hazardous condition on the neighbor's property. If Levene's definition of "vessel" were the law, a person would, as a matter of law, be liable for injury caused by the condition of his neighbor's property and owe a duty under *Scindia* for the condition of the "other" vessel simply because his employee stepped onto the vessel in

the course of his work. Such a standard would basically impose strict liability upon a vessel owner, regardless of whether he knew of any hazard on the "other vessel." There is no logical reason to impose a duty upon Pintail to know, correct and warn about hazards on a barge for which it was not a "vessel" under the LHWCA.

Levene argues that the Fifth Circuit "erroneously equates control over the adjoining vessel with hazards under the control of the tug." (Writ, p.11.) The district court and the Fifth Circuit correctly applied *Scindia* which imposes a duty upon a shipowner to use due care to avoid exposing an LHWCA worker to harm from hazards in areas, or from equipment under the "active control" of the vessel owner. *Scindia*, 451 U.S. at 170, 101 S. Ct. at 1622; *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1036 (5th Cir. 1983).

Pintail's shifting of the BB242 was a transitory contact which did not constitute the "active control" of the barge. The Fifth Circuit stated:

> . . . [W]e do not view the fleeting contact between Pintail and the BB-242 as the kind of control that could result in a finding of liability. We faced a similar situation in *Ducote v. International Operating Co. of La., Inc.*, 678 F.2d 543 (5th Cir. 1982). In that case, an employee injured while preparing a barge for cleaning sued both the actual owner of the barge and the company temporarily operating it while it was in for cleaning. Like Levene, Ducote argued that the temporary operator was its owner *pro hac vice*, and thus liable to him under the LHWCA. We rejected this attempt to characterize a limited

> contact as "control" for the purposes of *Scindia* duties, and held that "although [the cleaning company] tug did move the barge upon which the accident occurred, this movement 'was in connection with its obligation to the owner for cleaning and loading of the vessel. Those incidental operations certainly do not make [the cleaning company's] the owner *pro hac vice*.' " *Docote*, 678 F.2d at 545.
>
> * * *
>
> Levene, by contrast, asks us to deem Pintail in control of the BB-242, and thus to impose a duty to protect against unreasonably dangerous conditions. In light of the fact that Pintail had contact with the BB-242 only for a short time and only by chance as part of an operation to free another barge, we cannot do so.
>
> We reach the same result as in *Ducote* today. Although Captain Herbert temporarily was in "command" of both the SUTTON and the BB-242, this did not give Pintail constructive control over the work area of the barge and did not give rise to the degree of control we think Scindia requires before liability can attach. There was no evidence that Pintail had any responsibility for the condition of the deck of the BB-242. Pintail therefore was under no duty to make any inspection or use ordinary care to ensure that the BB-242 was free of unreasonable hazards.

(App. 24-25.) The district court found that Pintail was not negligent under *Scindia* and this factual finding was affirmed as not clearly erroneous. (App. 26.)

CONCLUSION

Levene has no jurisdiction for his Petition For Writ Of Certiorari. Even if there were jurisdiction, Levene has not shown any conflict in the circuits to justify a writ of certiorari. *Jones & Laughlin* and *Scindia* are proper, controlling legal authority which are dispositive of petitioners' claims.

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APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LESTER LEVENE, et al.	CIVIL ACTION NO. 87-0104
-VS-	
PINTAIL ENTERPRISES, Inc., et al.	SECTION "O" (JUDGE LITTLE)

OPINION

(Filed Feb. 9, 1990)

This action arises out of an accident in which Lester Levene, an employee of Pintail Enterprises Inc. ("Pintail"), was injured when he slipped and fell while attempting to cross a barge during a line-handling operation. Levene and his wife brought suit against Pintail, owner of the tugboat known as the M/V SUTTON, and Broussard Brothers, Inc. ("Broussard"), owner and operator of the barges known as BB-242 and BB-243. Subsequently, Scottsdale Insurance Company and Certain Underwriters at Lloyd's of London were added as defendants. A bench trial was conducted on 20 November 1989. After consideration of the pleadings, testimony, and evidence, the court makes these findings of fact and conclusions of law.

Findings of Fact

On 7 February 1986, Lester Levene, an employee of Pintail, injured his knee when he slipped on the deck of a barge. At the time of the accident, Levene was assisting Kevin Warner, a co-employee, complete a line-handling operation on the barge. Although Levene was employed primarily as a heavy equipment operator, he also engaged in roustabout activities and cement work when Pintail needed his assistance.

On the morning of the accident, Preston Hebert, a Pintail employee, inspected the M/V SUTTON, a vessel chartered and operated by Pintail. The inspection revealed that the SUTTON was staunch and fit for its intended voyage. Shortly thereafter, Hebert, who was also captain of the SUTTON, Levene and Warner boarded the SUTTON enroute to the Inexco drilling site to perform their daily work.

After these Pintail employees discharged their duties at the Inexco field, Hebert was instructed to proceed to Broussard Brothers, a barge facility in Intracoastal City, Louisiana, to pick up another barge for the next day's work. While the SUTTON made its way to Broussard Brothers, night fell and it started raining. Upon arriving at Broussard Brothers, Hebert, Warner and Levene commenced their search for a barge known as the BB-243. At this time, the rain was steady, the wind was blowing, and there was thunder and lightning.

To facilitate the search by illumination of the area, Captain Hebert used one of the SUTTON's spotlights. Although there were two spotlights aboard the SUTTON,

only one of these spotlights was operational. The main purpose for using the spotlight was to assist Levene and Warner in finding the BB-243. Hebert operated the spotlight from the wheelhouse. The Pintail employees found the BB-243 situated behind the BB-242 and beyond the SUTTON's reach. The BB-242 and BB-243, both approximately 120 feet in length and 30 feet in width, were flatbed barges, with their decks sitting three feet above the water line.

To obtain control over the BB-243, it was necessary to untie the BB-242 and move it out of the way. To accomplish this, Captain Hebert positioned the SUTTON's bow against the broad side of the BB-242 so that the vessel was perpendicular to the barge. Warner and Levene were then instructed to go to the mooring bits on opposite ends of the BB-242 and untie the lines in order release the BB-242 from the BB-243. Hebert aimed the spotlight directly down the middle of the BB-242 to assist Levene and Warner in the line-handling operation. Due to the positioning of the barge and vessel, lighting was adequate in the middle, but dim on the extreme right and left ends of the barge.

Despite the continuing rain and poor visibility, the Pintail employees proceeded with the line-handling operation. Levene and Warner could see a variety of objects, including oilfield equipment and scrap material on the deck of the BB-242. Levene left the SUTTON intending to reach the mooring bit in the far right corner of the barge. However, he was forced to walk toward the near right corner of the BB-242 because several obstructions on the barge prevented him from proceeding directly to his intended destination. After finding a clear route, Levene

changed his course and walked directly toward the far right mooring bit. Levene chose this route despite the presence of scrap material and grease in his path. Half way to the mooring bit, Levene slipped and fell to the deck of the barge injuring his knee. Despite this injury, Levene untied the mooring lines, returned to the SUTTON, and told Captain Hebert about the accident. Two days later, Levene reported the accident to Pintail.

Conclusions of Law

This action has been brought under the Longshore & Harbor Workers' Compensation Act, 33, U.S.C. § 901, *et seq.* ("LHWCA" or "Act"). Accordingly, this court has jurisdiction pursuant to 28 U.S.C. § 1331.

To recover under LHWCA, a person must be engaged in "maritime employment" and injured on a "maritime situs." 33 U.S.C. § 903; *Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 265, 279 (1977). A literal reading of the Act indicates it is applicable to traditional "longshoremen" and "harbor workers" engaged in maritime employment. See 33 U.S.C. § 902(3). The Fifth Circuit has held that the LHWCA umbrella covers independent contractors and their harbor worker employees while working aboard a vessel. *Hill v. Texaco*, 674 F.2d 447, 451 (5th Cir. 1982).

Under LHWCA, an injured worker is entitled to recover compensation benefits from his employer. 33 U.S.C. § 904. The LHWCA also permits an injured worker to bring a separate action against the vessel owner for vessel negligence. 33 U.S.C. § 905(b). Typically, an injured longshoreman or harbor worker recovers compensation

against his employer, and then brings a separate action for negligence against a separate vessel owner. Occasionally however, a LHWCA employer conducting stevedoring or other maritime related operations is also the vessel owner. Under such circumstances, an injured worker may bring suit against his employer "qua vessel" under 33 U.S.C. § 905(b) for injuries arising out of the vessel's negligence. *Taylor v. Bunge Corp.*, 845 F.2d 1323, 1327-28 (5th Cir. 1988); *White v. Cooper/T. Smith Corp.*, 690 F. Supp. 534, 538 (E.D. La. 1988). Thus, a LHWCA employer who acts in such a dual capacity can only be held liable for negligence in its capacity as the vessel owner. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 531 N. 6 (1983); *Kerr-McGee v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332, 1339 (5th Cir.), *reh'g denied*, 835 F.2d 288 (5th Cir. 1987); *Tran v. Manitowoc Engineering Co.*, 767 F.2d 223, 226 (5th Cir. 1985). The employer retains statutory immunity for any negligence it commits in its role as the injured worker's employer. 33 U.S.C. § 905(a); *Castorina v. Lykes Bros. S.S. Co., Inc.*, 758 F.2d 1025, 1033 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985).

Levene asserts that Pintail has vessel negligence for (1) failing to illuminate properly the work area on the BB-242, (2) failing to clear a path on the barge or warn Levene about the hazardous condition on the barge, (3) creating a hazardous condition on the barge, and (4) forcing Levene to work in bad weather, causing him to perform hastily his duties in an uncareful manner. On the other hand, Pintail contends that it is statutorily immune from suit under LHWCA for any acts of negligence committed in its capacity as Levene's employer. Under 33 U.S.C. § 904, a longshoreman or harbor worker who

suffers an injury that arises out of his employment is entitled to recover compensation from his employer regardless of whether the injury was caused by the employer's negligence. *Jones & Laughlin Steel*, 462 U.S. at 528-529; *See also Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1050 (5th Cir. 1983) (quoting *Voris v. Texas Employers Insurance Association*, 190 F.2d 929, 934 (5th Cir.), *cert. denied*, 342 U.S. 932 (1951)). Any liability incurred by an employer under 33 U.S.C. § 904 "shall be exclusive and in place of all other liability of such employer to the employee. . . . " 33 U.S.C. § 905(a).

In the case at bar, Levene was a Pintail employee injured while discharging his duties for Pintail. Clearly, Levene's injury occurred in the course of his employment. Therefore, Pintail, as Levene's employer, is only liable for LHWCA compensation and is statutorily immune from liability for the acts of negligence alleged by the plaintiff.

More importantly, Pintail contends that it cannot be held liable as owner of the SUTTON for Levene's injuries because none of the alleged acts constitutes vessel negligence. The Fifth Circuit has held that the duties owned by a shipowner to a longshoreman under 33 U.S.C. § 905(b) are those set forth by the United States Supreme Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). *Castorina v. Lykes Bros. S.S. Co., Inc.*, 758 F.2d 1025, 1033 (5th Cir. 1985). Under *Scindia*, a vessel owner has a duty to furnish a safe vessel and to warn a stevedore about any concealed defects in the ship's equipment or stevedore's work area reasonably known to the owner. *Id.* at 167. Furthermore, the shipowner has no general duty

to supervise a stevedore or inspect the vessel after stevedoring operations are in progress unless a law, custom, or contractual provision to the contrary exists. *Id.* at 172. A vessel owner has a duty to intervene if it learns that a dangerous condition arose in the stevedoring operation which would expose longshoremen to an unreasonable risk of harm due to the stevedore's "obviously improvident" actions. *Id.* at 175. Under this last duty, a shipowner can be held liable only if it had actual knowledge of both the dangerous condition and the stevedore's unreasonable actions in dealing with the danger. *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1038-39 (5th Cir. 1983).

Pintail asserts that it did not breach its *Scindia* duties, and cannot be held liable for negligence under 33 U.S.C. § 905(b). First, Captain Hebert testified at trial that he inspected the M/V SUTTON before the Pintail crew embarked on its mission to the Inexco drilling site. Hebert ensured that hand lanterns were available to Pintail's employees and that at least one of the SUTTON's two spotlights was operational. Overall, Captain Hebert's inspection revealed that the SUTTON was a safe vessel on the day Levene was injured. Nothing in the record indicates that the SUTTON's condition changed while in operation prior to the time it was turned over to Pintail's employees at the Broussard Brothers' facility. Therefore, this court concludes that Pintail, as owner of the SUTTON, satisfied its obligation to provide its employees with a safe ship. In addition, since there were no hidden hazards aboard the SUTTON about which Pintail had actual or constructive knowledge, Pintail did not breach its duty to warn its employees of such danger.

Pintail turned the SUTTON over to its own employees, just as a shipowner turns its vessel over to a stevedore, when the SUTTON arrived at the Broussard Brothers facility and the line-handling operation commenced. Captain Hebert, Warner, and Levene began the line-handling operation in inclement weather after locating the BB-243 and positioning the SUTTON next to the BB-242. Pintail, as vessel owner, correctly relied upon its employees to perform the line-handling operation and had no duty to supervise their work or inspect the SUTTON after the line-handling operation commenced. This conclusion is buttressed by the fact that the line-handling operation was performed almost exclusively on the BB-242 and not on the SUTTON.

Pintail also did not breach its limited duty under *Scindia* to intervene. The scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which the stevedore is assigned. In the instant case, the spotlight in use on the SUTTON was in proper working condition and provided adequate lighting throughout the job. The deck of the SUTTON appeared to be safe enough for Levene and Warner to proceed toward the BB-242. Clearly, the actions of Pintail's employees on the SUTTON, including Hebert's operation of the spotlight, were not so obviously improvident as to present an unreasonable risk of harm to the employees during the line-handling operation. Furthermore, the fact that Levene's injury occurred on the BB-242 , and not on the SUTTON, supports the conclusion that no duty to intervene arose.

This court holds that Pintail, as owner of the M/V SUTTON, did not breach any of the duties dictated by

Scindia. Therefore, Pintail is completely exonerated from liability under 33 U.S.C. § 905(b). We also find no liability on the part of Broussard Brothers, Inc. No negligence has been proved that the mere parking of a barge whose oily decks supported used oilfield equipment is a negligent activity by Broussard Brothers.

Accordingly, Levene's complaint against Pintail is DISMISSED.

An appropriate judgment will issue.

Alexandria, Louisiana.

8 February 1990.

/s/ F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4155

LESTER LEVENE, SR. and SHIRLEY LEVENE,

Plaintiffs-Appellants,

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Intervenor-Appellant,

v.

PINTAIL ENTERPRISES, INC., LLOYDS OF LONDON and SCOTTSDALE INSURANCE COMPANY,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Louisiana

(September 19, 1991)

Before WISDOM, KING and BARKSDALE, Circuit Judges.

KING, Circuit Judge:

The principal question in this appeal is whether a vessel owner owes any duties other than those enumerated in *Scindia Steam Navigation Co. v. De Los Santos*, 451

U.S. 156 (1981), to its non-stevedore employee conducting operations on a separate vessel. The district court, applying the *Scindia* standards, found that the vessel owner breached no duty to its employee, and dismissed the employee's claims. We agree with the district court's conclusion that *Scindia* provides the proper framework for analysis in this case, and accordingly affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

The district court found the following facts, which we accept as not clearly erroneous. *Kendall v. Block*, 821 F.2d 1142, 1146 (5th Cir. 1987); *O'Malley v. United States Fidelity & Guaranty Co.*, 776 F.2d 494, 497 (5th Cir. 1985).

Lester Levene was employed by Pintail Enterprises primarily as a heavy equipment operator, but he occasionally performed other work for Pintail as needed. On the morning of the February 7, 1986, Captain Preston Hebert, a Pintail employee, inspected the M/V SUTTON, a tugboat chartered and operated by Pintail, and determined that the SUTTON was fit for its intended voyage. Levene, Hebert and Kevin Warner, another Pintail employee, boarded the SUTTON and proceeded to a drilling site, where they performed their daily work. Hebert then was instructed to proceed to Broussard Bros., a barge facility in Intracoastal City, Louisiana, to pick up a barge for the next day's work. Enroute, night fell and rain began to fall. The crew was to pick up a barge, known as the BB-243, but they found another barge, the BB-242,

blocking their access.[1] It was thus necessary to untie the BB-242 and move it out of the way.

Captain Hebert positioned the SUTTON's bow against the side of the BB-242 and aimed the SUTTON's spotlight down the middle of the barge. He then sent Levene and Warner onto the BB-242 and instructed them to untie the lines from the mooring bits at opposite ends of the barge. By this time the rain was steady, wind was blowing, and there was thunder and lightning.

Because of the positions of the SUTTON and the BB-242, the spotlight provided adequate illumination down the middle of the barge, but the light tapered off and became dim at the ends of the barge where the mooring bits were located. Despite the rain and poor visibility, Levene and Warner proceeded to carry out Captain Hebert's instructions. They could see a variety of objects on the deck of the BB-242, including oilfield equipment and scrap material. Levene intended to go to the mooring bit at the far right corner, but the obstructions forced him to walk initially toward the near right corner. After finding a clear route, Levene changed his course and walked directly toward the far right bit. He did this despite the presence of scrap material and grease in his path. Halfway to the mooring bit, Levene slipped and injured his knee. He continued with the line-handling operation, and then returned to the SUTTON and told Hebert about the accident.

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[1] Both barges were flatbed barges approximately 120 feet long and 30 feet wide, with decks three feet above the water line.

Levene filed suit against Pintail, Broussard Bros. (owner of the barge) and Lee Bernard (owner of the SUTTON)[2] under the Jones Act, 46 U.S.C. § 688, and the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA), alleging that Pintail, Bernard and Broussard negligently caused the injury he sustained on the BB-242. The district court granted the defendants summary judgment on the Jones Act claim and conducted a bench trial on the LHWCA claim against Pintail.[3] He amended his complaint to add certain of the defendants' insurers.[4] The court agreed with Pintail that Levene's allegations of negligence – including Pintail's failure properly to illuminate the work area on the BB-242, its failure to clear a path or warn Levene of hazards on the barge, and its insistence on working in bad weather – constituted the potential negligence of Levene's employer. The court held that Pintail's statutory immunity from tort suit for negligent acts taken in its capacity as Levene's employer barred recovery for these acts. The court further held that Pintail had not committed any acts of vessel negligence in its capacity as owner of the SUTTON. The court concluded that there were no unreasonably dangerous conditions aboard the SUTTON

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[2] Bernard leased the SUTTON to Pintail under an oral bareboat charter agreement. The parties do not dispute that Pintail may be held liable as owner of the SUTTON. For the sake of simplicity, we refer throughout to Pintail as a vessel owner.

[3] Levene settled his claims against Broussard Bros., the owner of the barge, prior to trial. He has not appealed the dismissal of the Jones Act claim.

[4] Because we affirm the judgment, we need not address the coverage issues raised on appeal by the insurers.

of which Levene was not warned, and that Pintail came under no duty to intervene to prevent any injury during the line-handling operation. The court entered judgment dismissing all of Levene's claims, and Levene filed this appeal.

II. ANALYSIS

To recover under the LHWCA, a worker must be engaged in maritime employment and be injured on a maritime situs. *Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 255 (1977). The LHWCA provides for two different types of liability. Under § 904, a covered worker may receive compensation benefits from his employer without regard to fault. Under § 905(b), the same worker may pursue a tort action against the owner of a vessel for acts of vessel negligence. Thus, for example, a longshoreman working for an independent stevedore may recover benefits from his employer and may pursue a separate action in tort against the owner of the vessel on which he was injured. He may not, however, sue his employer in tort. Section 905(a) affords employers full immunity from tort suits by providing that compensation benefits "shall be exclusive and in place of all other liability of such employer to the employee . . . "

Frequently, however, a longshoreman is injured on a vessel owned by his employer. When an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued "qua vessel" for acts of vessel negligence. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 532 (1983); *Kerr-McGee Corp. v. Ma-Ju Marine Serv.*,

Inc., 830 F.2d 1332, 1339 (5th Cir. 1987). The difference between the capacities in which an employer may act is extremely important. The availability of a tort remedy for vessel negligence is a limited exception to the general structure of the LHWCA,[5] which, like state workers compensation schemes, generally replaces negligence causes of action against employers with a system of predetermined, standardized benefits. Therefore, we have held that an employer that also functions as a vessel owner is liable for vessel negligence under the same negligence standards applicable to an independent vessel owner. *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1033 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985) ("duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel"). The LHWCA absolutely bars suit for all other acts taken in the capacity as the employer of the injured worker.

This case is like *Jones & Laughlin* in that Pintail occupied a dual capacity as Levene's employer and vessel owner. Levene contends, however, that Pintail as employer is not immune from an action sounding in negligence because the principles of employer immunity under the LHWCA apply only to injured stevedores. We reject this argument as contrary to the plain language of the LHWCA and the consistent holdings of our cases. A better argument, and, we think the one that presents the

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[5] *See, e.g., Fruge v. Penrod Drilling Co.*, 918 F.2d 1163, 1169 (5th Cir. 1990) (describing *Scindia* as setting forth "broad pronouncements of immunity on the part of the vessel owner"); *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 896 (5th Cir. 1989), *modified on other grounds*, 929 F.2d 191 (5th Cir. 1991).

important question in this appeal, is that Pintail had a duty broader than that set forth in *Scindia* to protect Levene from injury on a barge separate from the Pintail vessel.

A. Applicability of Employer Immunity

Levene first argues that Pintail has no immunity in its capacity as employer because Levene and Captain Hebert were not performing stevedoring operations. He contends that "Pintail does not enjoy statutory immunity if its negligence does not arise out of 'stevedoring services.' To enjoy the statutory immunity, Pintail must demonstrate that (1) the captain was performing stevedoring services *and* (2) Lester Levene was performing stevedoring services." (emphasis in original). Levene appears to derive this argument from the following sentence in § 905(b), the section which provides for an action against a vessel for vessel negligence:

> If [an injured worker] was employed by the vessel to provide stevedoring services, no [negligence action against the vessel] shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

33 U.S.C. § 905(b). Having concluded that Pintail is not immune from liability for acts of negligence in its capacity as employer, Levene contends that Captain Hebert's decision to continue working despite the weather, his failure to provide adequate illumination, and his failure to provide a safe place to work should result in a finding that Pintail is liable for his injury.

We think Levene misconstrues both § 905(b) and the structure of employer immunity. Section 905(b) is concerned solely with granting an injured worker a tort remedy against a vessel for vessel negligence, *e.g.*, *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 896 (5th Cir. 1989), *modified on other grounds*, 929 F.2d 191 (5th Cir. 1991); *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 377 (5th Cir. 1988), and has nothing to say about the general immunity granted to an employer. That task is performed by § 905(a), which provides that the remedy prescribed in § 904 (compensation based on predetermined benefit schedules) "shall be exclusive and in place of all other liability of [an] employer to the employee. . . . "

In *Jones & Laughlin*, the Court took the sentence quoted above from § 905(b) as evidence that Congress intended to preserve the action for vessel negligence when the employer is also the vessel owner: why, the Court asked, would Congress have inserted this sentence barring suits against owner-employers for injuries caused by fellow servants if it had intended to bar *all* suits against employer owners in § 905(a). *Jones & Laughlin*, 462 U.S. at 530-31. It is evident that this sentence has nothing to do with the circumstances under which an *employer* retains immunity. It simply bars suits for vessel negligence against a vessel owner when the injury was caused by the negligence of a stevedore's fellow servant. *See Cavalier v. T. Smith & Son, Inc.*, 668 F.2d 861 (5th Cir.), *cert. denied*, 459 U.S. 860 (1982).

The relevant section of the LHWCA for purposes of Levene's argument is § 905(a). As noted above, that section provides tort immunity for all negligent acts taken in the capacity as employer, and leaves an injured worker

with LHWCA benefits as his exclusive remedy against his employer. *Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 791 (5th Cir. 1990); *Foreman v. Exxon Corp.*, 770 F.2d 490, 494 (5th Cir. 1985). Nothing in § 905(a) or *Jones & Laughlin* suggests that where workers are injured on vessels owned by their employers, the statute grants immunity only if the worker was performing stevedoring operations. Pintail argues strenuously that Levene *was* performing stevedoring operations and that therefore Pintail retains its immunity. While we doubt that Levene was acting as a stevedore, we need not decide this question, for it is clear that so long as Levene was a covered worker under the LHWCA – whether he was a stevedore or any other type of harbor worker – Pintail as employer enjoys full immunity from suit. We have on numerous occasions precluded recovery against an employer by injured workers performing non-stevedoring activities, *e.g.*, *Moore*, 912 F.2d at 791; *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 44 (5th Cir. 1989); *Robin v. Sun Oil Co.*, 548 F.2d 554, 556 (5th Cir. 1977), and we follow this rule today.

Levene's allegations that Pintail failed adequately to illuminate his path and did not provide him with a safe place to work are best characterized as acts of the employer. We agree with the district court that Pintail is immune from suit for these acts. Under *Jones & Laughlin*, however, Pintail may be liable for negligence in its capacity as a vessel owner. We turn next to the question whether, in this capacity, Pintail breached any duty it owed to Levene.

B. Vessel Negligence

Levene next argues that Pintail as a vessel owner breached a duty it owed him even though he was not injured by a dangerous condition on the SUTTON. The district court held that the duties owed Levene were those set forth in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and determined that Pintail committed no vessel negligence under that *Scindia* test. Levene contends that the district court erred because *Scindia* does not define the full scope of a vessel owner's duties when an employee is not injured on the owner's vessel.

Congress in § 905(b) replaced the unseaworthiness cause of action against a vessel with liability based on negligence, but gave no indication of what acts would constitute negligence. *Scindia* constituted the Supreme Court's effort to create substantive standards of negligence. *See Castorina*, 758 F.2d at 1032. In *Scindia*, the Court held that a vessel owner has three broad duties to a longshoreman engaged in stevedoring operations. Before operations begin, the owner must exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety. . . . " *Scindia*, 451 at 167. The owner at this time also must warn the stevedore of hidden dangers that could not be discovered by the exercise of ordinary care. *Id.*; *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986). Once stevedoring operations have begun, the owner has no duty to supervise or inspect the work and must only take care to prevent unreasonable hazards.

Scindia, 451 U.S. at 172; *Futo v. Lykes Bros. S.S. Co.*, 742 F.2d 209, 213 (5th Cir. 1984). There is an exception to this limited liability after operations have begun. The vessel owner must intervene with respect to obvious dangers if it acquires actual knowledge that a condition of the vessel or its equipment poses an unreasonable risk of harm *and* if the vessel owner acquires knowledge that the stevedore is not exercising reasonable care to protect its employees. *Scindia*, 451 U.S. at 175-76; *Lormond v. Superior Oil Co.*, 845 F.2d 536, 542 (5th Cir. 1987), *cert. denied*, 484 U.S. 1031 (1988).[6]

We have held that although *Scindia* arose in the context of stevedoring operations, the duties it enumerates are not limited to stevedores. In *Lormond*, we found that *Scindia* defined the duties owed to the LHWCA-covered

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[6] Consequently, we have recognized three exceptions to the general rule of nonliability once operations have begun.

> Vessel owner liability may arise:
>
> 1. [if the vessel owner fails] to warn on turning over the ship of hidden defects of which he should have known [Exception 1]
>
> 2. for injury caused by hazards under the control of the ship [Exception 2]
>
> 3. [if the vessel owner fails] to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of "obviously improvident" judgment, means to work on in the face of it and therefore cannot be relied on to remedy it. [Exception 3]

Masinter, 867 F.2d at 896-97 (citing *Turner v. Costa Line Cargo Services, Inc.*, 744 F.2d 505, 512 (5th Cir. 1984) (Gee, J., dissenting)).

employee of an independent contractor working aboard a jack-up vessel. *Lormond*, 845 F.2d at 541-42; *see also Hill v. Texaco, Inc.*, 674 F.2d 447, 451 (5th Cir. 1982). Similarly, in *Teply* we stated that in *Scindia* "[t]he Supreme Court interpreted § 905(b) as it applies to stevedores, but in principle as it applies to other harborworkers who work on board vessels as well." *Teply*, 859 F.2d at 377. As noted earlier, we have held that *Scindia* defines the duties owed to an injured worker by a vessel owner acting in a dual capacity as employer. *Castorina*, 758 F.2d at 1033. Thus, we believe, as did the district court, that *Scindia* governs Levene's § 905(b) action against Pintail for vessel negligence.[7]

The district court determined that Pintail had not breached its duties under *Scindia* because Pintail "satisfied its obligation to provide its employees with a safe ship." The court likened Pintail's action in turning over the tug after inspecting it and finding no hidden hazards

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[7] Levene argues that, because Pintail was a Jones Act employer with respect to Captain Hebert and Kevin Warner, and because both Levene and Warner were performing the traditional duties of seamen on the night of the accident, Pintail should be held to a "Jones Act-like" standard of care in this case. We have held, however, that a worker "does not cease to be covered by the [LHWCA] merely because at the moment of injury he is not performing his usual duties." *Reynolds v. Ingalls Shipbuilding Division*, 788 F.2d 264, 271 n.8 (5th Cir.), *cert. denied*, 479 U.S. 885 (1986). Jones Act duties apply only when a worker meets the test of seamen status in *Barrett v. Chevron U.S.A.*, 781 F.2d 1067 (5th Cir. 1986) (en banc); Levene concedes that he is covered by the LHWCA, not the Jones Act, and we therefore decline to apply any standards to Pintail other than those mandated by the LHWCA.

to a shipowner turning over a ship to a stevedore. Once the line-handling operation began, Pintail was under no duty to supervise the work, especially where it took place on another ship. The court also held that Pintail did not breach its duty under *Scindia* to intervene because "[t]he scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which the stevedore is assigned." While we disagree with the district court's characterization of any *Scindia* duty as applying only to stevedoring operations, we may affirm the judgment even though the district court may have arrived there through a method of reasoning that we would not adopt. *Masinter*, 867 F.2d at 896; *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 n.3 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987).

Levene essentially argues that, because he was performing non-stevedoring operations on a separate barge, Pintail's duties extended beyond the *Scindia* duties of ensuring the safety of the SUTTON, preventing unreasonable hazards once the operation began, and intervening with respect to obvious dangers. He asks us to fashion a standard of care in which a vessel owner such as Pintail must protect him from unreasonably dangerous conditions on any vessel he happens to board while carrying out his duties for his employer-vessel owner. We think such a rule is foreclosed by the Supreme Court's decision in *Scindia* and our cases recognizing that *Scindia* alone supplies the substantive negligence standards in an action under § 905(b). We cannot find in *Scindia* any mandate for extending the duty of a shipowner to protection against hazards on another ship. The very notion

under the dual capacity doctrine of holding one single entity liable for the negligence of "the vessel" but not for the negligence of "the employer" serves to limit liability to those acts taken in connection with the owned vessel itself. Absent alteration by the Supreme Court of the fairly detailed duties it has interpreted § 905(b) as imposing, we decline to fashion a general standard of "reasonable care" that would require a shipowner to protect against any and all hazards a longshoreman might encounter in the course of his work. Other than the duty to protect against hazards under control of the ship (which we consider a narrow exception and discuss below), we do not think *Scindia* imposes any duty on a shipowner to protect against hazards arising on a separate ship.

Levene cites *Pichoff v. Bisso Towboat Co., Inc.*, 748 F.2d 300 (5th Cir. 1984), and *Richendollar v. Diamond M Drilling Co.*, 784 F.2d 580 (5th Cir. 1986), for the proposition that some standard other than *Scindia* applies.[8] *Pichoff* involved the negligence of the defendant's general manager in giving a worker an inadequate flashlight rather than a drop light so that the worker could inspect the vessel's fuel tanks, and in order him to perform his work hurriedly so that the company would not lose money. The court found that only the order to hurry the work constituted vessel negligence, because this order forced the employee to work under dangerous conditions on the

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[8] We do not address Levene's citation to *Richendollar*, as the panel's finding of § 905(b) vessel negligence was overturned by this court sitting en banc. *Richendollar v. Diamond M Drilling Co.*, 819 F.2d 124 (5th Cir.), *cert. denied*, 484 U.S. 944 (1987).

vessel itself. The court did not discuss *Scindia* in determining what acts of the owner-employer could have constituted negligence, but we think our later decision in *Castorina* does not leave any room for the broad-based duty Levene urges.

It is true that Pintail may be held liable for injury caused by hazards under control of the tug. In *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983), we stated that "the owner has a duty to avoid exposing longshoremen to harm 'from hazards under the act or control of the vessel.' " *Id.* at 1036 (citing *Scindia*, 451 U.S. at 167); *see also Masinter*, 867 F.2d at 897. However, we do not view the fleeting contact between Pintail and the BB-242 as the kind of control that could result in a finding of liability. We faced a similar situation in *Ducote v. International Operating Co. of La, Inc.*, 678 F.2d 543 (5th Cir. 1982). In that case, an employee injured while preparing a barge for cleaning sued both the actual owner of the barge and the company temporarily operating it while it was in for cleaning. Like Levene, Ducote argued that the temporary operator was its owner *pro hac vice*, and thus liable to him under the LHWCA. We rejected this attempt to characterize a limited contact as "control" for the purposes of *Scindia* duties, and held that "although [the cleaning company's] tug did move the barge upon which the accident occurred, this movement 'was in connection with its obligation to the owner for cleaning and loading of the vessel. Those incidental operations certainly do not make [the cleaning company] the owner *pro hac vice*.' " *Ducote*, 678 F.2d at 545.

The cases in which we have found such control by the vessel owner as to impose a duty generally have

involved dangerous conditions on the owned vessel itself. In *Masinter,* we found that the vessel owner's crew was "solely responsible" for placing a stairway which resulted in injury to an independent contractor aboard the vessel. This level of control placed the owner under "a continuing duty of care to those aboard the vessel." 867 F.2d at 897. In *Theriot,* we found that the owner of a drilling barge controlled a concentration of drilling mud in the work area, on which an independent contractor slipped and fell. 783 F.2d at 535.[9] Levene, by contrast, asks us to deem Pintail in control of the BB-242, and thus to impose a duty to protect against unreasonably dangerous conditions. In light of the fact that Pintail had contact with the BB-242 for only for a short time and only by chance as part of an operation to free another barge, we cannot do so.

We reach the same result as in *Ducote* today. Although Captain Hebert temporarily was in "command" of both the SUTTON and the BB-242, this did not give Pintail constructive control over the work area of the barge and did not give rise to the degree of control we think *Scindia* requires before liability can attach. There was no evidence that Pintail had any responsibility for the condition of the deck of the BB-242. Pintail therefore was under no duty to make any inspection or use ordinary care to ensure that the BB-242 was free of unreasonable hazards.

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[9] *See also Turner v. Costa Line Cargo Services, Inc.,* 744 F.2d 505, 508-09 (5th Cir. 1984); *Walker v. Blacksea S.S. Co.,* 637 F.2d 287, 292-93 (5th Cir. 1981).

The district court found, from the testimony of Captain Hebert, that the SUTTON had been inspected and was deemed to be a safe vessel prior to the commencement of the day's operations. Furthermore, the court found that nothing changed the condition of the SUTTON before Pintail's employees engaged in the line-handling operation. The accident occurred not as the result of any defect in the SUTTON, but at best was the result of a series of employment decision. All the missteps Levene cites, from the decision to continue working despite the adverse weather conditions to the placement of the spotlight in the middle of the BB-242 must be classified as potential acts of employer negligence, not vessel negligence.[10] The district court's findings concerning Pintail's lack of negligence in its capacity as vessel owner are essentially factual in nature, and must be upheld unless clearly erroneous. *Lormond*, 845 F.2d at 543 & n.9. We do not find them to be such.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[10] Of course, we express no opinion on whether these acts actually were negligence, as employer negligence is irrelevant under the LHWCA. The important point here is that these were acts of the *employer*, and are not the kind of acts that can be classified as vessel negligence.

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SUBJECT																		CROSS APPEAL NO.	CASE NUMBER
CRIM	PRIS. w/	PRIS. w/out	2255 w/	2255 w/out	SOC. SEC.	NLRB	P.C. DIV.	P.C. FED	U.S. CIV	TAX COURT	BKCY	Oth Agcy Review	CIVIL RIGHTS	TAX D.C.	SCHOOL	CROSS APPEAL		90-4168X(ACC) X 90-4187(Add'l)	90-4155
								XX											

CIRCUIT 5 APPEAL S FROM Western DISTRICT OF Louisiana AT Lafayette/Opelousa

DATE DOCKETED 03-02-90 $100 FEE PAID in D.C. JUDGE F. A. Little, Jr.

DATE NOTICE OF APPEAL FILED 02-20-90

D.C. DOCKET NUMBER CV-87-0104 REPORTER Jackie Weaver

3

LESTER LEVENE, SR., and
SHIRLEY LEVENE, Plaintiffs-Appellants;
and
AMERICAN CASUALTY COMPANY, OF
READING, PENNSYLVANIA, Intervenor-Appellant;

versus

PINTAIL ENTERPRISES, INC., and
LLOYDS OF LONDON AND SCOTTSDALE
INSURANCE CO. Defendants-Appellees.

APPEARANCE FILED-DATE	CODE	ATTORNEYS FOR APPELLANT	ARG
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CLOSED

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TITLE: LEVENE -vs- PINTAIL ENTERPRISES, INC. NO. 90-4155

CASE CALENDARED

1. RECORD, EXHIBITS AND BRIEF INFORMATION — Filing:

Reporter's Ack. due 3/17 — Trans. Fld. 4/2/90
Transcript due 4/2 — Disc. Date 5/2
Partial Record or Cert. List
APR 13 1990 Record on Appeal — No. of Vols. 13
Supp. Record — No. of Vols.
Second Supp. Record — No. of Vols.
Third Supp. Record — No. of Vols.
APR 13 1990 Exhibits ☐ Env. ☒ Boxes 2 ☐ Pkg. ☐ Roll
Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll
JUN 1 1990 Appendix ☐ (P) ☐ (M)
Records Excerpts – Appellant (American Casualty Co.
AUG 7 1990 Record Excerpts – Appellee (PINTAIL)
4-13-90 Briefing Notice Issd
MAY 23 1990 Brief for Appellant Am. Casualty Co.
6-13-90 Brief for Appellant (Levene) PT JUN 20 1990
Brief for Appellant
Brief for Cr. Appellant
AUG 7 1990 Brief for Appellee (SCOTTSDALE)
AUG 7 1990 Brief for Appellee (PINTAIL) ET AL,
Brief for Appellee
Brief for Cr. Appellee
8-27-90 Reply Brief for Appellant (PT) 9-4-90
Reply Brief for Cr. Appellant
Supp. Brief for Appellant
Supp. Brief for Appellee
Brief for Amicus
12/3/90 Rule 28(j) ltr-Appellee (CE)
11/29/90 Rule 28(j) letter–Appellant CE
11/28/90 Rule 28(j) letter–Appellee Pintail, etal (CE)
6-13-90 Rec Exp - Appellant (Levene)
PT JUN 20 1990 (M)
Aug. 7-90 "SCOTTSDALE" ADOPTS BRIEF OF PINTAIL
12/3/90 Rule28(j) ltr-Appellant (CE)

MISCELLANEOUS FILINGS — Filing:

03-02-90 Dup. Notice of Appeal and Clerk's
3/13/90 Statement of Docket Entries (Add'l)
Papers Trans. from Misc. No.
Order of DC Granting/Denying Appeal IFP
Order of DC Granting/Denying IFP & CPC
Order of DC Appointing Counsel
Affidavit of Financial Status
CJA 20 Issd./Voucher Recd.
NOA Treated as CPC Application

AGENCY REVIEW CASES — Filing:

Petition for Review of Order ( ) of
☐ NLRB ☐ FERC ☐ ICC ☐
Application for Enforcement–NLRB
Answer to Application for Enforcement
Cross Application for Enforcement

4. EXTENSION Flg. Motion for: — Order Fld. — Ext. to:

Transcript
Transcript
5/17/90 Transcript
Appellant's Brief — 6-12-90 — 6/13/90
Appellant's Brief
Appellant's Brief
7/13/90 Appellee's Brief — 8/6/90
11/23/90 Appellee's Brief Pintail & Lloyds 8/6/90
Appellee's Brief
8/15/90 Reply Brief — 8/27/90
8/16/90 (M) " (Levene) "

5. CALENDAR INFORMATION Week of 12-3-90
Special Panel
Summary Panel:
10-26-90 Case Assigned for 12-3-90 In
☐ EB ☐ W ☐ E ☐
Case Cont'd for Reassignment
Case Reassigned for In
☐ EB ☐ W ☐ E ☐
Hearing Panel: JMW-CDK-RHB
12/3/90 Case Argued ☑ by Appellant ☑ by Appellee
Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION P ☑ NP ☐ 9 Print Pages
09/19/91 Opinion Rendered
☑ Affirmed
☐ Reversed
☐ Affd. in Pt. ☐ P.C. ☐ Conc. Spec.
☐ Vacated XX Signed ☐ Dis.
☐ Dismissed ☐ Rule 47.6 ☐ Dis. in Pt.
Opinion Withdrawn
Pub. in T. Form, Pt I

7. REHEARING INFORMATION
Mot. for Ext.–Ext. to:
Mot. for Ext.–Ext. to:
10-4-91 Petition for Rehearing (J)
☑ Appellant ☐ Appellee ☐ Reg. ☑ En Banc
Petition for Rehearing
☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc
Response of
10-25-91 Order Denying Rehearing
☐ Dissenting
☐ Opinion on Petition for Rehearing

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NO. 90-4155

& MOTIONS

Filing Motion to or for:	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
Consolidate Appeals W/							
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraws as Counsel							
Appointment of Counsel							
Supplement Record							
Exhibits							
10/1/91 Reducing File ... in Excess Pgs.				✓	✓		10/1/91 CDK
File Brief in Excess Pgs.							
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
File Supp. Brief							
Stay of Mandate							
Recall of Mandate							
Intervene							

App. 29

Intervene							
Intervene							
File Reply Br. out of time							

9. OTHER DOCKET ENTRIES

10. JUDGMENT OR MANDATE INFORMATION

SEP 19 1991 Bill of Costs
____ Flg. & Entg. Judgment
____ Issg. Copy of Jdgt. to Bd & Cnsl.
Mandate Stayed to ____
11.6.91 Jdgt. as Mdt. Issd. to Clerk
____ Jdgt. as Mdt. Reissd. to Clerk
____ Dismissal Issd. to Clerk ____
11.6.91 Record on Appeal Retd. to Clerk 13 Vol.
11.6.91 Exhibits Retd. to Clerk 2 boxes

11. SUPREME COURT INFORMATION

____ Notice of Appeal to S.C.
____ Preparing Proceedings on Certiorari
____ Preparing Supp. Proceedings on Cert.
____ Transmitting Orig. Exhibits to S.C.
____ Order of S.C.–Ext. to ____
____ Notice of Flg. of Cert. Pet. on ____
____ Order of S.C. ☐ Denied ☐ Granted ____
____ Notice of Denial of Pet. for Rehearing
____ Opinion of S.C. dated ____
S.C. Docket # ____

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APPENDIX 4

90-4155

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 90-4155

LESTER LEVENE, SR. and SHIRLEY LEVENE
Plaintiffs-Appellants

and

AMERICAN CASUALTY INSURANCE COMPANY
Intervenor-Appellants

versus

PINTAIL ENTERPRISES, INC., LLOYDS OF LONDON, and SCOTTSDALE INSURANCE COMPANY
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAFAYETTE/OPELOUSAS DIVISION

SUGGESTION FOR REHEARING EN BANC

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Attorney for American Casualty
Insurance Company
Intervenor-Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record for Plaintiffs – Appellants, certifies that that [sic] the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1.

Lester Levene, Sr. and Shirley Levene
Plaintiffs – Appellants

2.

John E. McElligott, Jr. and Philip A. Fontenot
Davidson, Meaux, Sonnier, McElligott & Swift
Attorneys for Plaintiffs – Appellants
Lester Levene, Sr. and Shirley Levene

3.

Pintail Enterprises, Inc. and Lloyds of Londaon [sic]
Defendants – Appellees

4.

Campbell E. Wallace and Steven E. Psarellis
Hoffman, Sutterfield, Ensenat & Bankston
Attorneys for Defendants – Appellees

5.

Scottsdale Insurance Company
Defendant – Appellee

6.

H. Evans Scobbe Durrett, Hardin, Hunter, Dameron & Fritchie
Attorney for Defendant – Appellee
Scottsdale Insurance Company

7.

American Casualty Insurance Company
Intervenor – Appellant

8.

John R. Walker
Guglielmo, Lopez, Tuttle & Walker
Attorney for Intervenor – Appellant
American Casualty Insurance Company

9.

Lee Bernard
Owner of the vessel, M/V Sutton

Respectfully submitted,

DAVIDSON, MEAUX, SONNIER,
McELLIGOTT & SWIFT

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Supreme Court:

Jones & Laughlin Steel Corp. v. Pfeifer,
103 S.Ct. 2541 (1983)

Kermarac v. Compagnie Generale Transatlantique,
358 U.S. 625, 70 S.Ct. 406 (1959)

Scindia Steam Navigation Co. v. De Los Santos,
451 U.S. 156 (1981)

and the following decisions of the United States Court of Appeals for the Fifth Circuit:

Castorina v. Lykes Bros. S.S.Co., Inc.,
758 F.2d 1025, (5th Cir. 1985)

Gay v. Barge 266,
915 F.2d 1007 (5th Cir. 1990)

Futo v. Lykes Bros. Steamship Co., Inc.,
742 F.2d 209 (5th Cir. 1984)

Helaire v. Mobile Oil,
709 F.2d 1031 (5th Cir. 1983)

Masinter v. Tenneco Oil Co.,
867 F.2d 892 (5th Cir. 1989)

Musial vs. A & A Boats, Inc.,
696 F.2d 1149 (5th Cir. 1983)

Pichoff v. Bisso Towboat Co., Inc.,
748 F.2d 300 (5th Cir. 1984)

Theriot v. Bay Drilling Corp.,
783 F.2d 527 (5th Cir. 1986)

Respectfully submitted,

DAVIDSON, MEAUX, SONNIER,
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TABLE OF CASES AND AUTHORITIES

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Masinter v. Tenneco Oil Co., 867 F.2d 892 (5th Cir. 1989) 6, 7, 9, 10, 12

Musial vs. A & A Boats, Inc., 696 F.2d 1149 (5th Cir. 1983) 7, 9, 10, 13, 14

Pichoff v. Bisso Towboat Co., Inc., 748 F.2d 300 (5th Cir. 1984) 10, 13, 14

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) 1, 2, 8, 9, 10, 11, 12, 13, 14, 15

STATEMENT OF THE ISSUE

Pursuant to the provisions of Rule 35 of the Federal Rules of Appellate Procedure, petitioners respectfully suggest to the judges of this Honorable Court that the entitled cause is appropriate for consideration on rehearing by all the judges of this court convened en banc. In support of this suggestion petitioners submit the following significant legal issue for review:

Does a vessel owner owe any duty to its non-stevedore employee conducting hazardous operations under the direction and control of the vessel owner even though

part of the operations and the subsequent accident occur away from the vessel? The panel decision concludes that the negligence of a vessel owner under Section 905(B) is limited to the vessel owner's negligence within the confines of the vessel. The panel of the Fifth Circuit reaches this result even though the accident occurred in a work area under the direction and control of the vessel owner.

The panel erroneously concluded that *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981), requires this result.

It is respectfully submitted that as recognized by the panel of this Honorable Court the issue presented is of significant importance and petitioners urge the review of this entire court.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This is a cause of action for personal injuries sustained by Lester Levene while working as a longshoreman assigned to the M/V Sutton on February 7, 1986. Significantly, the captain had positioned the M/V Sutton against the barge where the accident occurred so as to allow Levene to travel across the barge to look for another inward barge to be transported by the M/V Sutton. Levene was directed by the captain of the vessel to leave the safe confines of the vessel and venture out into treacherous weather over a debris cluttered barge without proper illumination to search for the intended barge requested by the vessel owner. During the performance of his duties in the service of the ship, Mr. Levene was seriously injured.

A bench trial was conducted on November 20, 1989. The trial court relying on *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), exonerated Pintail from liability under 33 U.S.C. Section 905(B). A panel of this Honorable Court affirmed the district court's conclusion (though not the reasoning) on September 19, 1991.

STATEMENT OF THE FACTS

On February 7, 1986 Lester Levene was employed by Pintail Enterprises, Inc. primarily as a heavy equipment operator. The tugboat on which he was working, the M/V Sutton, was operated by Pintail Enterprises, Inc. pursuant to a verbal bareboat charter agreement. Therefore, it is undisputed that Pintail was the owner pro hoc vice of the vessel.

The M/V Sutton was manned by a captain, one designated deckhand and Mr. Levene. In essence, Mr. Levene served as a borrowed deckhand at the time of the accident subject to the complete authority and control of the vessel owner through its captain.

Prior to the accident, Levene's duties included assisting the captain and performing traditional deckhand duties such as line-handling operations.

Immediately before the accident the crew had been working in excess of eighteen (18) hours. The vessel owner had instructed the vessel to search and pick up a barge as the BB-243 located at the Broussard Brothers docking area along the Intracoastal Waterway. As between Pintail and Broussard Brothers it was customary

for Pintail to locate the barge leased from the Broussard Brothers' dock area.

The crew had already been working in excess of eighteen (18) hours when the M/V Sutton reached the docking facility. It was late at night, raining very hard, the wind was blowing and there was thunder and lightning.

Despite the inclement weather, the captain decided to continue the search for the unmanned barge. It was the decision of the vessel owner alone to decide whether or not to continue the vessel operations that evening in light of the dangerous conditions.

The captain positioned the bow of the vessel at a midpoint on a barge that was stacked alongside an inland barge. This was done to allow the deckhand and Mr. Levene ingress and egress from the outward barge to the inward barge to determine if the inward barge was actually the one that was chartered by the vessel owner.

The barge that was adjacent to the bow of the M/V Sutton had been loaded two (2) days previously by certain members of the Pintail, but not Mr. Levene. Subsequently, the captain was aware that this particular barge was cluttered with debris and equipment *prior to the incident*.

At the time of the accident the designated deckhand and Mr. Levene were instructed to go to the mooring bits on the opposite ends of the outward barge and untie the lines in order to release this barge from the inward barge.

The M/V Sutton was equipped with two (2) spotlights, but only one spotlight was operational. The captain aimed the only operational spotlight directly in the middle of the barge to assist the deckhand and Mr. Levene in the line-handling operation. Due to the position of the barge and vessel, the lighting was adequate in the middle of the barge, but not on the extreme right and left ends of the barge where the mooring bits were located and where Mr. Levene needed to walk.

Despite the continued rain and poor visibility, the captain instructed the Pintail employees to proceed with the line-handling operation. Levene left the Sutton intending to reach the mooring bit in the far right corner of the barge. However, he was forced to walk toward the near right corner of the barge because several obstructions on the barge prevented him from proceeding directly to his intended destination. Levene was injured when he slipped and fell on some slippery substance while attempting to make his way in the dark towards the mooring bit.

The fact that the barge was cluttered with oilfield equipment and debris was *known and obvious to the captain*. The captain also was well aware of the poor weather conditions, the inadequate lighting and as agent of the vessel owner he decided to extend the operations of the vessel under these dangerous conditions.

In summary, the vessel owner was not only aware of the dangerous weather and conditions on the adjacent barge, but forged ahead with only one spotlight operational which could not provide proper illumination to the two (2) Pintail employees working on opposite ends of

the barge. Neither the deckhand nor Mr. Levene were provided with proper illumination in an effort to safely negotiate on the barge in an effort to accomplish the mission mandated by the vessel.

It is clear that although Mr. Levene's accident happened adjacent to the M/V Sutton, the negligence stemmed from the negligence of the vessel owner in operating a defective vessel (only one operational spotlight), failing to provide proper illumination from the vessel to the unlit barge and continuing operations under treacherous circumstances.

ARGUMENT

The following hypothetical using the same factual backdrop illustrates the conflict created by the panel's decision in the case sub-judice from previous decisions of this Circuit.

Hypothetical:

(1) Let's assume three (3) maritime workers are assigned to the M/V Sutton.

(2) Further assume that the captain of the vessel instructs all three (3) employees that despite the treacherous weather conditions and inadequate lighting the employees are to make their way from the vessel to an adjoining barge that is unreasonably dangerous.

(3) Maritime worker (A), after leaving the wheelhouse, is injured while making his way along the vessel because he cannot see a dangerous condition on the deck of the vessel. Does maritime worker (A) have a valid cause of action under Section 905(B)? Clearly the answer

is a resounding "yes"! See *Masinter v. Tenneco Oil Company*, 867 F.2d 892 (5th Cir. 1989).

> " . . . it is beyond peradventure that Marlin owed to Masinter a duty of care to take precautions necessary to avoid exposing Masinter to the hazardous conditions created by the placement of the stairway." (867 F.2d at p. 897)

(4) Let us assume that maritime worker (B) working alongside maritime worker (A) safely negotiates the deck of the vessel but is injured when he slips and fall [sic] on a board serving as a gangplank between the vessel and the barge. Does maritime worker (B) have a valid cause of action under Section 905(B) against the vessel owner for failing to provide safe ingress and egress? The answer is a resounding "yes"! See *Gay v. Barge 266*, 915 F.2d 1007 (5th Cir. 1990).

(5) Let us further assume that maritime worker (C) (Lester Levene) is fortunate to negotiate the hazardous vessel deck, even more fortunate to negotiate the wooden gangplank, but is less fortunate in trying to make his way over the barge as directed to do by the vessel owner. Does maritime worker (C) (Lester Levene) have a valid cause of action under Section 905(B)? The answer should be "yes" because as in *Masinter* and in *Gay* the vessel owner is liable for providing a safe work place under the vessel owner's control.

Taking the hypothetical one step further, let us assume that another maritime worker (we will call him maritime worker (D)) in order to return to the vessel must use a swing rope adjacent to a platform in order to

swing over the barge back to the M/V Sutton. Unfortunately, maritime worker (D) does not quite make it to a safe area of the vessel's deck and is injured. Does maritime worker (D) have a valid cause of action under Section 905(B)? The answer, according the Fifth Circuit, is "yes"! See *Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir. 1983).

It is submitted that the legal conclusion of the panel is completely at odds with established precedent of the Circuit.

ANALYSIS

Under the facts and circumstances of this case, it is submitted that the appropriate inquiry is as follows:

(1) Does the *Scindia* analysis apply to this 905(B) action in lieu of the duty to exercise reasonable care under the circumstances of each case as set forth in *Kermarac v. Compagnie Generale Transatlantique*, 79 S.Ct. 406 (1959) and *Federal Marine Terminals v. Burnside Shipping Company*, 89 S.Ct. 1144 (1969)?

(2) If the *Scindia* analysis is applicable, did the panel decision correctly analyze this case in light of the legal principal's established in this Circuit?

Petitioner submit [sic] the analysis should begin with a review of the relevant statutes. Section 905(B) reads as follows:

"In the event of injury to a person covered under this act *caused by the negligence of a vessel* . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was

caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . "

It is undisputed under the facts of this case that the dual capacity doctrine is applicable and that Pintail is the vessel owner for purposes of Section 905(B). It is also clear that the statute does not define what is "neglignece of a vessel." This section does place a limitation on recovery if the person employed by the vessel is providing stevedoring services, then no action will be permitted if the negligence resulted from those also engaged in providing stevedoring services. In fact, throughout the appellate history of this case, Pintail strenuously argued that the stevedoring limitation set forth under Section 905(B) was applicable arguing that the negligence of the captain was not vessel negligence but employer or stevedore negligence. Pintail also strenuously argued that Levene was acting as a stevedore. The panel expressed doubt that Levene was acting as a stevedore, though it concluded that it need not decide this question. See Page 9 of the panel decision. However, the panel never analyzed the actions of the captain as agent of the vessel owner as to whether his negligence was vessel negligence versus employer negligence. The only finding that could be reached was that the captain was acting as master of the vessel and not acting as a stevedore or employer. *The panel simply concluded that the vessel owner had no obligation to Mr. Levene under section 905(B) because this accident occurred away from the vessel.*

Under 33 U.S.C. Section 902 (21) the term "vessel" means any vessel *upon which or in connection with* which any person entitled to benefit under this act suffers injury

or death or arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bareboat charter, master, officer or crew member. Clearly, the act does not require physical injury upon the vessel for recovery under Section 905(B).

Does the jurisprudence of this Circuit limit recovery to injuries only occurring on the owner's vessel? Vessel negligence can take many forms. Consider *Masinter, Helaire, Musial, Scindia,* etc. Vessel negligence can be of omission or commission arising out of a defective vessel, an unsafe appurtence, or an imprudent direction emanating from the vessel's owner or agent. This Honorable Court has NEVER concluded that a vessel owner has no obligation to a party simply because the accident occurred outside the confines of the vessel when, in fact, the vessel was the precipitating cause of the accident.

Suppose that while Lester Levene was on the adjacent barge, the captain negligently rammed the barge with the tug and knocked Mr. Levene down into the water. Under the reasoning set forth by the panel decision, Mr. Levene would have no cause of action against the vessel owner under Section 905(B). Is there any legal distinction in the captain bumping the barge with the vessel knocking down Mr. Levene versus directing him onto the adjacent barge in treacherous weather without proper illumination? This type of action has always been considered to be vessel negligence rather than employer negligence. See *Masinter, Musial,* supra and *Pichoff v. Bisso Towboat Co., Inc.*, 748 F.2d 300 (5th Cir. 1984).

The panel of this Honorable Court does rule that it does not agree with the district court's analysis. The

district court likened Pintail's action in turning over the tug after inspecting it and finding no hidden hazards to a ship owner turning over a ship to a stevedore. "Once the line-handling operation began, Pintail was under no duty to supervise the work, especially where it took place on another ship." The district court also held that Pintail did not breach its duty under *Scindia* to intervene because "the scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which a stevedore is assigned." The panel disagreed stating:

> "While we disagree with the district court's characterization of any *Scindia* duty as applying only to stevedoring operations, we may affirm the judgment even though the district court may have arrived there through a method of reasoning that we would not adopt."

It is submitted that the only way to reach the result of the panel is to determine that (1) the actions of the captain cannot be construed as vessel negligence; or (2) the vessel owner simply owes no obligation beyond the parameters of the vessel.

Let us closely look at Page 13 of the panel decision.

> "Levene essentially argues that, because he was performing non-stevedoring operations on a separate barge, Pintail's duties extended beyond the *Scindia* duties of ensuring the safety of the Sutton, preventing unreasonable hazardous [sic] once the operation began, and intervening with respect to obvious dangers.

> He asked us to fashion a standard of care in which a vessel owner such as Pintail must protect him from unreasonably dangerous conditions on any vessel he happens to board while carrying out his duties for his employer/vessel owner. We think such a rule is foreclosed by the Supreme Court's decision in *Scindia* and our case is recognizing that *Scindia* alone applies to substantive negligent standards in an action under Section 905(B). We cannot find in *Scindia* any mandate for extending the duty of a ship owner to protection against hazards on another ship."

Petitioners agree that a vessel owner should not be responsible per se for the hazards on an adjoining vessel. However, the vessel owner should be responsible for sending out workers in the employ of the ship to work in hazardous conditions with a defective spotlight providing improper illumination and knowing that the worker will encounter a hazardous and slippery deck on the adjacent barge cluttered with debris.

The panel apparently felt their conclusion was mandated by the Supreme Court in *Scindia*.

> "Absent alteration by the Supreme Court of the fairly detailed duties, it has interpreted Section 905(B) as imposing, we decline to fashion a general standard of 'reasonable care' that would require a ship owner to protect against any and all hazards a longshoreman might encounter in the course of his work. Other than the duty to protect against hazards under the control of the ship (which we consider a narrow exception discussed below), we do not think *Scindia*

> imposes any duty on a ship owner to protect against hazardous arising on a separate ship."

Returning to the hypothetical situation, let us suppose that the vessel drops off Levene on a barge obviously unseaworthy and that barge sinks injuring or drowning Mr. Levene. Under the panel decision there would be no cause of action under Section 905(B) or under the General Maritime Law.

The panel decision does recognize that Pintail may be held liable for injury caused by hazards "under control of the tug." In *Helaire*, we stated that:

> "The owner has a duty to avoid exposing longshoremen to harm 'from hazards under the act or control of the vessel.' Id. at 1036, citing *Scindia*, 451 U.S. at 167; see also *Masinter*. However, we do not view the fleeting contact between Pintail and the BB-242 as a kind of control that could result in a finding of liability."

Petitioners certainly acknowledge that the M/V Sutton had fleeting contact with the adjacent barge. However, it is respectfully submitted the panel erroneously equates control over the adjoining vessel with "hazards under the control of the tug." Simply stated, Pintail had *complete control and authority* (which it exercised) to determine if the work should have been undertaken and the method and manner of illuminating the workplace especially when Pintail knew of the dangers associated with the barge.

Furthermore, the panel decision incorrectly concluded that there was no evidence that Pintail had any responsibility for the condition of the deck of the barge. There was direct testimony that only two (2) days earlier

Pintail had littered the barge with equipment. Whether or not Pintail had any responsibility for the condition of the barge deck is immaterial because Pintail was directly responsible for ordering the crew to proceed under the hazardous conditions!

It is respectfully submitted that the panel of this Honorable Court either erroneously concluded that the *Scindia* analysis is applicable or at the very least has misinterpreted the clear precedent of this Fifth Circuit in the application of the *Scindia* doctrine.

Petitioners submit it is legally appropriate to analyze closely whether or not the *Scindia* analysis is applicable.

In *Kermarac*, supra, the U.S. Supreme Court stated the following:

> "It is the subtle principle of maritime law that a ship owner owes a duty to exercise reasonable care to those lawfully aboard the vessel who are not members of the crew . . . " (79 S.Ct. at P. 409)
>
> *"We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to its legitimate interest the duty of exercising reasonable care under the circumstances of each case."* (Emphasis added) (79 S.CT. at P. 410)

Likewise, see *Federal Marine Terminal, Inc. v. Burnside Ship, Co., Ltd.*, 89 S.Ct. 1144 (1969) wherein the U.S. Supreme Court held that a vessel owner owes a duty of due care to not only the stevedoring company, but to others lawfully on the ship. In *Burnside*, the plaintiff claimed that the vessel owner was negligent for failing to properly guard a deep tank opening, failure to provide

clear passageway, and failure to provide adequate lighting, etc., said allegations similar to those asserted in the instant case. The highest court confirmed the reasonable care approach in *Scindia*.

> " . . . this court reversed, preferring to adopt a single duty of 'exercising reasonable care under the circumstances of each case,' rather than to incorporate in the maritime law the complexities of the common law of invitee and licensee. (Citation submitted.) . . . the *Kermarac* standard was reaffirmed in *Federal Marine Terminal v. Burnside Ship. Co., Ltd.*, (citations omitted), a case involving a suit by a stevedore against a ship owner. *We have no quarrel with this standard. INEVITABLY, HOWEVER, THE RULE WILL UNDERGO REFINEMENT AS IT IS APPLIED TO VARIOUS CATEGORIES OF CASES* . . . (Emphasis added) (101 S.Ct. at p.1620, n.10)

The Supreme Court recognized that a "reasonable care" standard would have the necessary flexibility given the particular circumstances of a case. This case requires the refinement of the "reasonable care standard" referred to in *Scindia*.

This very circuit has also recognized that the *Scindia* analysis may not be appropriate in certain 905(B) cases.

In *Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir. 1983), this circuit *refused* to apply the *Scindia* analysis in evaluating the vessel owner's negligence in the context of the use of a swing rope from an oil platform to the vessel.

See also *Pichoff v. Bisso Towboat Co., Inc.*, 748 F.2d 300 (5th Cir. 1984). The trial court made the following conclusions:

> "Bisso was negligent in failing to provide Pichoff with adequate lighting . . . Had Bisso provided a drop light, Pichoff would likely have 'not injured himself.' It was foreseeable that Pichoff would need a drop light to provide greater illumination to free his hands while he inspected the compartment. Bisso was negligent in ordering Pichoff to conduct a hurried inspection without one."

The panel decision seems to suggest that the decision of *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025 (5th Cir. 1985) somehow limits Pichoff " . . . we think our later decision in *Castorina* does not leave any room for the broad-based duty Levene urges."

Pichoff is still good law in the Fifth Circuit and has been cited with approval in *Gay v. Barge 266*, supra.

Petitioners have no quarrel with *Castorina* which concerns the duty of the vessel owner for the latent defects in the vessel's cargo. Petitioners firmly believe this was a case correctly decided properly under the *Scindia* analysis. However, the instant case like *Pichoff* is not subject to the *Scindia* analysis, but the reasonable care standard that the Supreme Court has recognized and followed in this Circuit. *Kermarac, Federal Marine Terminal, Inc., Pichoff, Musial.*

Petitioners argued that under the circumstances of this case, especially considering that Levene was actually performing seaman duties, the standard of care owed the vessel owner is akin to a Jones Act duty. This makes sense

because a designated deckhand performing the exact duties of Levene was a Jones Act seaman. The captain could certainly be considered negligent and responsible to the the deckhand under the Jones Act even though the accident occurred away from the vessel. Thus, in the context of *this particular case*, it is submitted that the vessel owner using a "reasonable care" approach owed a duty not to send Levene out on the adjacent barge given the poor weather conditions, the lack of illumination and the hazards associated with the barge itself, all known and recognized by the vessel owner.

CONCLUSION

Both the Supreme Court and this Circuit have stressed the need for uniformity in our maritime law. It is respectfully submitted the panel decision does considerable violence to the wealth of jurisprudence that has been consistently decided by this Circuit under the guidelines set forth by the U.S. Supreme Court.

Petitioners urge that a reasonable care standard under general maritime law principles is a standard that has been adopted by the highest court of this land. *Kermarac, Federal Marine Terminal, Inc.*, supra and applicable to this case.

Whether or not the *Scindia* analysis is appropriate, it is absolutely clear that the vessel owner was responsible for jettisoning Mr. Levene into the hazards that led to his

accident. This vessel negligence should be addressed and remedied by the entirety of this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 3rd day of October, 1991.

/s/ John E. McElligott Jr.
JOHN E. McELLIGOTT, JR.

/s/ John R. Walker
JOHN R. WALKER

APPENDIX 5

Trial Transcript Excerpts

* * *

[p. 120] BOOK.

MR. WALLACE: OURS IS BLACK; PLAINTIFF'S IS BLUE. PLAINTIFF EXHIBIT 1, YOUR HONOR.

MR. MCELLIGOTT: HE WAS REFERRING TO OUR EXHIBIT.

THE COURT: OKAY, I'M SORRY. YOU SAID IT WAS BLACK, THAT IS WHERE I WAS. GO AHEAD, SIR, I'M SORRY.

A THIS SHOWS THE HOURS THREE MEN WORKED FOR THIS PARTICULAR DAY; RANDALL WHITE, LESTER LEVENE AND KEVIN WARNER, AND WHAT THEY DID AND HOW MANY HOURS, YOU KNOW, THEY WORKED ON IT.

Q THIS PARTICULAR EXHIBIT IS TWO DAYS BEFORE THE ACCIDENT MR. LEVENE HAD ON THE BARGE, FEBRUARY 5TH, 1987?

A YES, THAT IS CORRECT.

Q THERE IS AN ENTRY DOWN THERE THAT SAYS, QUOTE, KEVIN WARNER ON PINTAIL BARGE, END QUOTE.

MR. MCELLIGOTT: THAT IS A MISSTATEMENT.

THE COURT: KEVIN WORKED ON PINTAIL BARGE.

Q I'M SORRY. KEVIN WORKED ON PINTAIL BARGE?

A RIGHT. YEAH, THAT IS A HOUSEBOAT WE WERE BUILDING IN THE YARD, IT IS A LITTLE FOURTEEN BY THIRTY FOOT HOUSEBOAT BARGE TO BUILD A HUNTING CAMP ON THAT WE HAD AT THE SHOP ON BARRELS. KEVIN HAD CUT FOAM FLOTATION [p. 121] AND WAS INSERTING IT IN THE BARGE IN CASE IT WOULD GET WATER OR SOMETHING IN IT NOT TO SINK.

Q OKAY.

A IN FACT, I HAVE PICTURES OF IT.

Q WAS THAT BARGE – IN ACTUALITY WAS GOING TO BE A HOUSEBOAT?

A YES, SIR. WE WAS GOING TO MAKE A HUNTING CAMP OUT OF IT.

Q ALL RIGHT. ON FEBRUARY 5TH, 1987, WHEN KEVIN WARNER WAS WORKING ON THAT, QUOTE, PINTAIL BARGE, WAS THAT BARGE IN THE WATER?

A NO, SIR, IT WAS ON LAND ON BARRELS BEHIND OUR WELDING SHOP.

Q OKAY. MR. WARNER HAS INDICATED IN A DEPOSITION THAT HE BELIEVED THAT –

MR. MCELLIGOTT: I WOULD OBJECT TO AN IMPROPER FORM, LEADING, YOUR HONOR.

THE COURT: WHY DO WE CARE WHAT HE THINKS.

MR. WALLACE: YOUR HONOR, I WAS SIMPLY LAYING IT AS A PREDICATE. I'M NOT GOING TO ASK THE WITNESS – I WAS JUST TRYING TO ORIENT THE WITNESS, YOUR HONOR.

THE COURT: WELL, ORIENT HIM TO ANOTHER PERSON'S DEPOSITION I DON'T THINK IS LAYING ANY [p. 122] PROPER FOUNDATION. WHAT IS IT THAT YOU ARE TRYING TO DEVELOP?

MR. WALLACE: WE ARE TRYING TO DEVELOP WHERE KEVIN WARNER WAS TWO TO THREE DAYS BEFORE. I WILL DIRECTLY ASK THAT QUESTION.

Q MR. TRAHAN, HAVE YOU LOOKED AT THE WORK RECORDS OF PINTAIL FOR APPROXIMATELY ONE MONTH BEFORE THE ACCIDENT, THAT IS EXHIBIT 70?

A YES, I HAVE.

Q AND BASED UPON THOSE RECORDS, DOES – IS THERE ANY REFERENCE TO KEVIN WARNER LOADING SCRAP MATERIALS ON A BARGE AT THE BROUSSARD BROTHERS FLEET?

A NO. THERE IS –

MR. MCELLIGOTT: YOUR HONOR, I WOULD OBJECT INSOFAR AS THE RECORDS WILL SPEAK FOR THEMSELVES.

THE COURT: I WILL OVERRULE THE OBJECTION.

Q BASED ON YOUR RECOLLECTION OF WHAT WORK WAS GOING ON AT THE TIME OF THE – RIGHT

BEFORE LESTER LEVENE'S ACCIDENT, DO YOU RECALL ANY WORK IN WHICH BROUSSARD – STRIKE THAT. MR. TRAHAN, DO YOU RECALL ANY WORK WHICH WAS GOING ON IN THE MONTH BEFORE LESTER LEVENE'S ACCIDENT ON FEBRUARY 7, 1986 IN WHICH KEVIN WARNER AND OTHER PINTAIL EMPLOYEES HANDLED SCRAP MATERIAL AT THE BROUSSARD BROTHERS YARD?

[p. 123] A WE BROUGHT IN SOME OIL FIELD EQUIPMENT OF CLOVELLY OIL FROM BROUSSARD BROTHERS THAT CAME IN TO THE BROUSSARD BROTHERS DOCK THAT THEY PICKED UP AT A PLATFORM AND BARGED INTO BROUSSARD BROTHERS, UNLOADED ON THE BANK, WE SENT TRUCKS AND HANDS DOWN THERE, IT WAS LOADED ON OUR TRUCKS, AND WE BROUGHT IT TO OUR YARD AND STORED IT –

Q OKAY.

A – FOR CLOVELLY OIL.

Q I'M GOING TO SHOW YOU WHAT I WILL MARK AS DEFENDANT'S EXHIBIT 70-A, WHICH IS PART OF EXHIBIT 70, IT IS A WORK TICKET FOR JANUARY 25TH, 1986. COULD YOU TELL US WHAT EXHIBIT 70-A IS?

A THIS IS A WORK TICKET FOR ONE, TWO, THREE, FOUR, FIVE, SIX MEN THAT WAS RE-BILLED TO CLOVELLY ON JANUARY 25TH, 1986.

Q ALL RIGHT. WHAT TYPE OF WORK DID THAT WORK CREW DO FOR CLOVELLY OIL COMPANY AT

THE BROUSSARD BROTHERS FLEETING AREA ON THAT DAY?

A WENT DOWN THERE AND PICKED UP SOME EQUIPMENT THAT CAME IN TO THEIR DOCK BY BARGE AND WAS LOADED ON OUR TRUCKS AND BROUGHT TO OUR YARD TO STORE – TO BE STORED.

Q DO YOU RECALL WHAT KIND OF EQUIPMENT THAT WAS?

A IT WAS OIL FIELD EQUIPMENT, SIR.

Q COULD YOU GENERALLY DESCRIBE WHAT KIND OF OIL FIELD EQUIPMENT IT WAS?

* * *

[p. 248] THAT, DID YOU?

A LIKE I SAID BEFORE, THEY LEFT IT UP TO MY DECISION.

Q WHAT YOU ARE SAYING IS YOU DIDN'T KNOW ABOUT A RULE WHERE YOU WERE NOT SUPPOSED TO BE MOVING BARGES AROUND IN THE MIDDLE OF THESE BAD WEATHER CONDITIONS?

THE COURT: NO, THAT IS NOT AT ALL. YOU ARE CATEGORIZING THE TESTIMONY ABSOLUTELY UNFAIRLY AND IMPROPERLY. IF THE WEATHER IS REAL BAD THEN THEY ARE NOT GOING TO MOVE THE BARGES. BUT EVERYBODY AGREES THAT IT IS MR. HEBERT THAT HAS GOT TO MAKE THE ANALYSIS, THE VALUE JUDGMENT, AS TO HOW BAD THE WEATHER IS, AND HE IS THE MAN THAT IS ON THE SCENE, AND THAT IS NOT WHAT THE PREVIOUS

WITNESS SAID AT ALL. I DON'T THINK THERE IS ANY DIFFERENCE IN THE TESTIMONY.

BY MR. MCELLIGOTT:

Q LET ME ASK YOU THIS, SIR, WHEN YOU CAME UP ON THE TUG AND YOU TIED UP TO THE BARGE AND YOU SHINED YOUR LIGHT IN THE MIDDLE OF THE BARGE –

A YES, SIR.

Q – YOU WERE ABLE TO SEE THAT THIS BARGE WAS CLUTTERED WITH SCRAP MATERIAL, IS THAT CORRECT?

A IT HAVE A FEW SCRAP MATERIALS ON IT.

Q AND AT LEAST THE PART THAT YOU COULD SEE IT HAD SCRAP MATERIAL ON IT, IS THAT CORRECT?

* * *

[p. 254] A AT TIMES.

Q DIDN'T LESTER LEVENE NORMALLY ASSIST A DECKHAND IN SITUATIONS SUCH AS THIS?

A SOMETIMES THEY WOULD.

Q OKAY. WHEN KEVIN WARNER AND LESTER LEVENE – BEFORE THEY WENT OUT ON THAT BARGE YOU WERE WELL AWARE AS CAPTAIN THAT THERE WAS SCRAP METAL ALL AROUND THAT BARGE AREA, ISN'T THAT CORRECT?

MR. WALLACE: OBJECTION.

THE COURT: NO, I THINK HE CAN ANSWER, I WILL OVERRULE THE OBJECTION.

A NO, SIR, I WASN'T AWARE THEY HAD IT ALL OVER THE BARGE.

Q YOU WERE AWARE THAT AS FAR AS YOU COULD SEE FROM THE LIGHT THAT THERE WAS SCRAP METAL AS FAR AS YOU COULD SEE, CORRECT?

A ON SOME PLACES –

Q NOW, –

A – THEY HAD A FEW SCRAP METAL ON THE BARGES.

Q YOU ALSO KNEW, SIR, THAT IT WAS EXTREMELY WET ON THAT BARGE, DID YOU NOT?

A IT WAS WET.

Q IT WAS POURING DOWN RAIN?

A YES, SIR.

Q YOU ALSO KNEW THAT MANY TIMES BARGES LIKE THIS, [p. 255] WITH THAT SCRAP METAL ON THE BARGES, THAT THERE IS OIL AND GREASE ON THOSE BARGES?

A NO, SIR. I WASN'T AWARE THAT THEY HAD ANY GREASE ON THE BARGE AT THAT TIME.

Q YOU COULDN'T SEE IT FROM WHERE YOU WERE, BUT IT WOULD NOT BE UNUSUAL TO HAVE OIL AND GREASE ON A BARGE SUCH AS THAT, CORRECT?

A IT IS POSSIBLE.

Q YOU KNEW IT WAS VERY POSSIBLE?

A YES, SIR.

Q YOU KNEW BEFORE THOSE WORKERS WENT OUT THERE THAT IT WAS VERY POSSIBLE, NOT ONLY WAS IT SLIPPERY BECAUSE OF THE RAIN, IT MAY HAVE BEEN EVEN MORE SLIPPERY BECAUSE OF OIL AND GREASE?

A NO, SIR, I DIDN'T KNOW THAT AT THAT TIME.

Q NOW, WHEN KEVIN WARNER WENT OUT TO THE LEFT YOU COULDN'T SEE KEVIN WARNER, COULD YOU?

A I SAW KEVIN WARNER - I SAW KEVIN WARNER GET DOWN, I COULD SEE HIM UP IN HERE (INDICATING), AFTER THAT I COULDN'T SEE HIM.

Q OKAY. WOULD YOU PUT A BIG 'X' MARK THE LAST POINT YOU COULD SEE KEVIN WARNER, USE THIS RED.

A (MARKING) AT THIS POINT -

Q THAT'S ALL I'M SAYING RIGHT NOW, THAT IS ALL I'M ASKING YOU, OKAY, SIR. NOW, YOU SAW LESTER LEVENE GO OFF

* * *

[p. 261] OVER THEM MAYBE HE COULD HAVE WALKED OVER THEM.

Q WELL, YOU KNEW HE HAD TO WALK OVER THE PIPES, RIGHT

A NO, SIR.

Q WELL, THAT IS WHAT YOU TOLD MR. FONTENOT BEFORE THIS LAWSUIT WAS FILED?

A AS FAR AS I KNEW, FROM WHAT I COULD – AS FAR AS I COULD SEE, I FIGURED THE BARGE WAS EMPTY ON EACH SIDE WITH TWO FEET OR THREE FEET OF CLEARANCE ON ALL SIDES OF THE BARGE.

A SO YOU WANTED – SO, YOU FELT LIKE THAT THERE WAS MAYBE TWO OR THREE FEET OF CLEARANCE ON EITHER SIDE OF THE BARGE?

A THAT IS WHAT I ASSUMED BEING – WHERE MY BARGE WAS THEY HAD A CLEARANCE AS FAR AS I COULD SEE.

Q YOU ASSUMED THAT, BUT YOU NEVER CHECKED IT WITH YOUR SPOTLIGHT?

A NO, SIR.

Q OKAY. AS FAR AS YOU COULD SEE WITH YOUR SPOTLIGHT THERE WAS SCRAP METAL AS SHOWN ON THIS DIAGRAM?

A YES, SIR.

Q AND WHAT YOU TOLD –

MR. WALLACE: DID YOU MARK THIS AS SCRAP METAL? FOR THE RECORD, ON THE EXHIBIT 24 THE ELLIPTICAL FIGURE IN THE CENTER.

[p. 262] Q BUT ANYWAY, ON THE NIGHT IN QUESTION, AS FAR AS YOU COULD SEE WITH THAT SINGLE LIGHT WITHOUT DOING ANY – TAKING ANY

EFFORT TO CHECK IT, THERE WAS SCRAP METAL AS FAR AS YOU COULD SEE ON EITHER SIDE OF THE LIGHT?

A YES, SIR.

Q AND IT WAS YOUR IMPRESSION AT THAT TIME AND IT WAS YOUR IMPRESSION WHEN YOU TOLD MR. FONTENOT THAT MR. LEVENE WAS TO HAVE TO BE REQUIRED TO STEP OVER THE SCRAP IRON?

A I DIDN'T THINK HE WOULD HAVE HAD TO WALK OVER IRON TO GET TO THE BIT.

Q BUT YOU NEVER – YOU NEVER CHECKED TO DETERMINE IF HE COULD OR NOT, DID YOU?

A NO, SIR. WHEN YOU – OUR POLICY, WHEN WE USUALLY LOAD A BARGE OF SCRAP, WE USUALLY ALLOW CLEARANCE ALL OF THE WAY AROUND THE BARGE.

Q WELL, DID BROUSSARD –I MEAN DID PINTAIL LOAD THIS BARGE?

A NO, SIR. IT IS SUPPOSED TO BE ALL POLICIES.

Q ISN'T IT A REAL SIMPLE TASK FOR YOU TO SHINE YOUR SPOTLIGHT ON EITHER END OF THE BARGE TO SEE EXACTLY WHAT WAS ON THE END OF THE BARGE, CORRECT?

A YES, SIR.

Q BUT YOU NEVER THOUGHT ABOUT DOING THAT, IS THAT CORRECT?

* * *

[p. 289] Q ALL RIGHT. HAD YOU USED THE B.B. 242 BEFORE?

A YES, SIR.

Q ALL RIGHT. WAS THE B.B. 242 LOADED?

A NO, SIR.

Q IT WAS A CLEAN FLAT BARGE?

A CLEAN BARGE.

Q ALL RIGHT. HAD YOU EVER SEEN THE BARGE ON WHICH MR. LEVENE SAYS HE FELL BEFORE?

A I NEVER REALLY NOTICED THE NUMBER OF THE BARGE, NO, SIR.

Q OKAY. WAS THERE ANYTHING THAT STUCK OUT IN YOUR MIND ABOUT THIS BARGE MR. LEVENE WAS ON BEING ANY DIFFERENT FROM ANY OTHER BARGE YOU HAD SEEN BEFORE?

A NO, SIR.

Q HAD YOU OR ANYONE ELSE TO YOUR KNOWLEDGE EVER LOADED ANY MATERIALS SUCH AS THE GLYCOL UNIT OR THE PIPES OR THE SCRAP MATERIALS ON THAT BARGE?

A YES, SIR. WE LOADED BARGES MANY A TIME.

Q WELL, MY SPECIFIC QUESTION IS: TO YOUR KNOWLEDGE, HAVE YOU OR ANYONE AT PINTAIL EVER LOADED THESE SCRAP MATERIALS ON THAT SPECIFIC BARGE ON WHICH MR. LEVENE FELL?

A NOT THAT I CAN RECALL.

Q ALL RIGHT. BEFORE MR. LEVENE AND MR. WARNER WENT OUT ONTO THE BARGE DECK WITH THE BARGE WITH THE SCRAP

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[p. 292] WAS A CLEAR PATH BEYOND WHERE YOU COULD SEE MR. LEVENE?

MR. MCELLIGOTT: OBJECTION, YOUR HONOR, CALLS FOR SPECULATION FROM THIS WITNESS.

MR. WALLACE: ASKING STATE OF MIND, YOUR HONOR.

THE COURT: THIS IS HIS EXPERIENCE IN THE AREA OF STACKING DEBRIS ON BARGES AND LEAVING WALKING PATHS AND THAT IS WHY HE HAS THE CONCLUSION THAT HE BELIEVES THIS WOULD BE THE SAME WAY. THAT IS WHAT HE IS GOING TO SAY, I DON'T THINK THERE IS ANYTHING WRONG WITH THAT.

Q FROM WHERE YOU WERE STANDING ON THE TUG DID YOU – WHAT DID YOU THINK ABOUT WHETHER THERE WAS A CLEAR PATH TO THE LEFT BEYOND WHERE YOU LAST SAW MR. WARNER AND TO THE RIGHT BEYOND WHERE YOU LAST SAW MR. LEVENE?

A TO MY KNOWLEDGE IT WAS CLEAR BEING – WHERE I COULD SEE THEY HAD A CLEAR PATH AND I THOUGHT IT WAS ALL THE WAY AROUND.

Q ALL RIGHT. DID YOU EVER LEARN ANYTHING DIFFERENT, THAT THERE WAS NOT A CLEAR PATH TWO TO THREE FEET ALL OF THE WAY AROUND THE OUTER PERIMETER OF THE BARGE?

A NO, SIR.

Q DID YOU KNOW THAT LESTER LEVENE INTENDED TO WALK ACROSS SCRAP MATERIALS?

[p. 293] A NO, SIR.

Q DID LESTER LEVENE – FROM WHERE YOU LAST SAW MR. LEVENE AT THE GREEN CIRCLE ON EXHIBIT 24, DID YOU THINK LESTER LEVENE WAS GOING TO TURN LEFT OR TURN RIGHT OR DID YOU EVEN THINK ABOUT IT?

A NO, SIR.

Q OKAY. DID LESTER LEVENE EVER TELL YOU WHAT PATH HE WAS GOING TO TAKE ACROSS THE BARGE TO GET TO THE OTHER BIT?

A NO, SIR.

Q FROM WHAT YOU SAW SITTING IN THE WHEELHOUSE AND WATCHING WHAT WAS GOING ON ON THE BARGE, DID YOU KNOW LESTER LEVENE WOULD HAVE TO STEP ON PIPES TO GET TO THE LINES HE WAS SUPPOSED TO HANDLE?

A NOT TO MY KNOWLEDGE.

Q DID YOU EXPECT LESTER LEVENE TO WALK ON PIPES IF HE DIDN'T HAVE ENOUGH LIGHT TO SEE WHERE HE WAS WALKING?

A NO, SIR.

Q HAD YOU EVER HAD DECKHANDS WALK ON BARGES WITH SCRAP MATERIAL BEFORE?

A YES, SIR.

Q NOW, ON THOSE OCCASIONS DID THE DECKHANDS EVER ASK FOR LIGHTS TO BE SHINED ON THE SCRAP MATERIAL?

A NO, SIR. THE ONLY THING, I TOLD THEM JUST BE CAREFUL, TAKE IT EASY TO WALK ACROSS IT AND YOU MAY NOT

[p. 294] FALL.

Q NOW, DID YOU SEE LESTER LEVENE'S PATH BEYOND THAT CIRCLE YOU MARKED IN GREEN ON THE RIGHT?

A NO, SIR.

Q DID YOU SEE HIM ACTUALLY WALKING ON TOP OF THE SCRAP MATERIAL?

A NO, SIR, I DID NOT.

Q DURING THE COURSE OF THESE – OR THIS LINE-HANDLING OPERATION, DID YOU EVER LEARN THAT THERE WAS IN FACT GREASE OR OIL ON THESE PIPES?

A NO, SIR.

Q DID LESTER LEVENE EVER COME BACK TO YOU AT ANY TIME DURING THIS LINE-HANDLING OPERATION AND ASK FOR THE LIGHT TO BE SHINED ON HIS PATH OR A FLASHLIGHT?

A NO, SIR.

Q OR A HANDLIGHT?

A NO, SIR.

Q HE DIDN'T ASK FOR ANY MORE LIGHT?

A NO, SIR.

Q LET ME ASK YOU ABOUT THE WEATHER. WAS THE WEATHER AT THE TIME OF THE LINE-HANDLING OPERATION ON THIS PARTICULAR BARGE SIGNIFICANTLY DIFFERENT THAN IT HAD BEEN BACK IN THE FLEET WHERE YOU HAD BEEN HUNTING FOR THE BARGE?

A NO, SIR.

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[p. 442] A YES.

Q DO YOU RECALL THAT MR. FONTENOT ASKED YOU IF YOU KNEW WHERE THIS SCRAP MATERIAL HAD COME FROM?

A YEAH. I TOLD HIM WE HAD PUT IT THERE.

Q TO THE BEST OF YOUR RECOLLECTION, YOU SAID YOU PUT IT THERE?

A YEAH.

Q OKAY. WHEN YOU WERE TALKING TO MR. FONTENOT WAS YOUR MEMORY FRESH?

A BASICALLY SO I GUESS, IT WAS WHAT, A YEAR AFTER THE ACCIDENT WHEN HE FIRST TALKED TO US?

Q YES. FRESHER THAN IT IS NOW?

A YES.

Q AND DO YOU RECALL MR. FONTENOT ASKING YOU ON THE BOTTOM OF PAGE 3; OKAY, WE ARE BACK ON THE RECORD, WE HAVE GONE OFF MOMENTARILY, WE DID NOT SAY ANYTHING WHILE WE WAS OFF THE RECORD, IS THAT CORRECT? YES, OKAY. THE MATERIAL THAT WAS ON THE BARGES, HOW DID IT GET THERE, DO YOU KNOW? ANSWER, KEVIN; I GUESS IT WAS JUST LEFT OVER FROM THE PREVIOUS JOB IT WAS ON. PHILIP; OKAY. WHO PUTS THE MATERIAL ON THE BARGES, IS IT BROUSSARD BROTHERS PUTTING MATERIALS ON THE BARGES OR IS IT ANOTHER COMPANY THAT PUTS IT ON THE BARGE AND LEFT IT THERE? KEVIN: –

MR. MCELLIGOTT: YOU HONOR, I WOULD OBJECT –

[p. 443] THE COURT: WAIT A SECOND, WAIT A SECOND. WHAT IS THE OBJECTION?

MR. MCELLIGOTT: I WANT TO OBJECT, HE IS TRYING TO IMPEACH THIS WITNESS BECAUSE OBVIOUSLY AS THE QUESTION IS FRAMED HE IS TALKING ABOUT THE GENERAL PROCEDURE ABOUT THINGS ON BARGES, AND THERE IS NO REFERENCE TO THIS PARTICULAR BARGE, THE FACT THAT HE EVEN USES THE TERM BARGES IN GENERAL. THAT IS THE POINT I WANTED TO MAKE.

THE COURT: OKAY, HE CAN FINISH THE QUESTION AND THEN YOU CAN ANSWER IT, MR. WARNER, AND SEE IF THAT IS WHAT YOU SAID AND

IF THAT IS WHAT YOU MEAN TO BE APPLICABLE IN THIS SPECIFIC CASE. THAT IS THE POINT YOU ARE TRYING TO MAKE.

MR. MCELLIGOTT: YES, SIR.

A OKAY. I THINK I PROBABLY MISUNDERSTOOD WHAT MR. FONTENOT WAS TALKING ABOUT. IF YOU WILL LOOK A FEW PAGES PREVIOUS TO THAT, HE ASKED A GENERAL QUESTION ABOUT THE SAME THING WHERE I MENTIONED THAT WE – I WAS IN FACT OVER THERE LOADING SOME OF THE MATERIALS ON THAT BARGE.

Q WELL, WILL YOU SHOW THAT TO ME, I WILL GIVE YOU THE STATEMENT, AND FOR THE RECORD, THIS IS EXHIBIT 4 – EXHIBIT 22, I'M SORRY.

THE WITNESS: IS THIS THE ONE YOU HAD ME LOOK AT THE OTHER DAY?

[p. 444] MR. MCELLIGOTT: YOUR HONOR.

THE COURT: WELL, I WON'T INTERRUPT.

MR. WALLACE: I THINK THIS IS – I WAS JUST SHOWING THE WITNESS THE STATEMENT, EXHIBIT 22.

MR. MCELLIGOTT: MY POINT IS, THE WITNESS MAY BE CONFUSED BETWEEN THE STATEMENT AND THE DEPOSITION THAT HE GAVE.

THE COURT: HE TALKED ABOUT THIS STATEMENT BEING THE ONE HE GAVE ABOUT A YEAR AFTER THE ACCIDENT. I DON'T KNOW WHEN THE DEPOSITION WAS.

MR. MCELLIGOTT: SEPTEMBER OF '87, YOUR HONOR.

THE COURT: OKAY. THIS WAS JANUARY OF '87.

A OKAY, THIS IS NOT THE ONE I WAS TALKING ABOUT, THE ONE YOU HAD ME LOOK AT YESTERDAY.

Q THE ONE THAT MR. MATTHEWS, MY INVESTIGATOR, TOOK FROM YOU?

A YEAH. HE HAD ME LOOK AT ONE WHERE THEY HAD THE SAME THING ON IT, BUT THE PREVIOUS – A FEW PAGES BEFORE THAT.

Q YOU ARE WELCOME TO LOOK AT THAT. FOR THE RECORD, THAT IS EXHIBIT –

MR. MCELLIGOTT: YOUR HONOR, I WOULD ASK THAT THE WITNESS –

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[p. 508] RESPONSIVENESS, YOUR HONOR.

MR. FONTENOT: I'M GOING TO RE-ASK IT.

Q MY QUESTION IS: ON FEBRUARY 7TH, 1986, TO YOUR KNOWLEDGE WERE THERE ANY HANDLIGHTS OR FLASHLIGHTS ONBOARD THE SUTTON?

A NO, SIR, I DIDN'T SEE ANY.

Q OKAY. NOW, WHEN YOU ALL ARRIVED AT THE MILCHEM DOCK THE SUTTON WAS ALREADY THERE WITH THE BARGE CONNECTED TO IT?

A YES, IT WAS.

Q OKAY. AND HOW DID THE - WHERE WAS THE CHERRY PICKER?

A THE CHERRY PICKER WAS PUT ON THE BARGE THAT EVENING BEFORE.

Q OKAY. AND WHO DID THAT?

A I DID.

Q ALL RIGHT. THE THREE OF YOU ALL GOT ON THE BARGE AND YOU ALL WENT TO THE INEXCO FACILITY?

A NO, SIR. WHEN WE GOT THERE THAT MORNING WE WAS SUPPOSED TO HAVE A LUBRICATOR THERE AT THE TIME WE GET THERE, AND PRIOR TO THE TIME WE GOT THERE THE LUBRICATOR WASN'T THERE YET, SO WE HAD TO WAIT FOR THE LUBRICATOR.

Q ALL RIGHT. BUT MY QUESTION IS, LESTER, LISTEN, FROM THE MILCHEM DOCK YOU ALL LEFT ON THE SUTTON PUSHING THE BARGE WITH THE CHERRY PICKER AND YOU ALL HEADED FOR [p. 509] THE INEXCO WELL FACILITY?

A YES, SIR, WE DID.

Q DID YOU ALL HAVE TO GO THROUGH SOME LOCKS?

A YES, SIR, WE DID.

Q DO YOU KNOW THE NAME OF THOSE LOCKS?

A I THINK, I'M NOT TOO SURE, IT COULD BE THE VERMILION LOCKS.

Q OKAY. WHO TIED THE LINES IN THE LOCKS AND THEN HELPED UNTIE THE LINES IN THE LOCKS WHEN YOU ALL WENT THROUGH THEM?

A KEVIN AND I BOTH TIED THEM.

Q OKAY. SO YOU ALL BOTH DID IT TOGETHER?

A YEAH. KEVIN TIED THE FRONT AND I TIED THE BACK.

Q OKAY. NOW, WHEN YOU ALL ARRIVED AT THE INEXCO WELL FACILITY DID YOU ALL TIE UP TO I GUESS THE WELL ITSELF OR SOMETHING?

A YES, SIR. KEVIN AND I BOTH DONE THE TYING.

Q YOU HELPED HIM TO THAT ALSO?

A YES, SIR.

Q ALL RIGHT. AND THEN YOU SAID YOU ALL HAD TO WAIT FOR A LUBRICATOR?

A YEAH, THAT MORNING JUST BEFORE WE WENT OUT TO THE LOCATION THERE WAS A LUBRICATOR THAT WAS SUPPOSED TO BE THERE FOR WHEN WE GET THERE. BUT PRIOR TO THAT TIME THE LUBRICATOR DID NOT SHOW UP UNTIL LATER, WHICH WAS [p. 510] SOMEWHERE AROUND – COULD HAVE BEEN AROUND SEVEN O'CLOCK WHEN THE LUBRICATOR SHOWED UP.

Q OKAY. NOW, BY THE TIME THAT THE LUBRICATOR CAME – WHAT DID YOU HAVE TO DO WITH IT?

A THE LUBRICATOR CAME AND THE MAN FROM THE MILCHEM DOCK LOADED IT ON THE BARGE WITH A DRAGLINE, I PERSONALLY HOOKED IT UP.

Q AND YOU HOOKED IT UP TO WHAT, THE CHRISTMAS TREE?

A I HOOKED IT UP TO THE DRAGLINE SO THE DRAGLINE COULD SET IT ON THE BARGE.

Q OKAY. NOW, BY THE TIME THIS WAS DONE AND YOU ALL WERE READY TO LEAVE THE INEXCO WELL, WHAT TIME OF THE DAY WAS IT?

A IT WAS SOMEWHERE AROUND FOUR THIRTY OR A QUARTER TO FIVE.

Q OKAY. WAS THAT THE END OF THE DAY FOR YOU ALL, THE END OF THE WORK YOU ALL WERE GOING TO DO THAT DAY, OR WERE YOU ALL GOING TO GO DO SOMETHING ELSE AFTER THAT?

A YES, SIR. I HEARD A CONVERSATION BETWEEN PRESTON AND THE INEXCO BOSSMAN TALKING.

Q AND WHAT WAS THE DISCUSSION?

A THE DISCUSSION WAS ABOUT TO GET ANOTHER BARGE FOR THE NEXT DAY, THEY NEEDED A BARGE FOR SOME REASON, I DON'T KNOW WHAT IT WAS, BECAUSE BY THE TIME I GOT

THERE MAYBE THEY HAD ALREADY DISCUSSED WHAT THEY NEEDED IT FOR. [p. 511] OKAY, THAT WAS EARLIER BEFORE WE GOT READY TO KNOCK OFF.

Q OKAY. SO BEFORE YOU ALL KNOCKED OFF THAT DAY AT THE INEXCO WELLSITE YOU HEARD THE INEXCO MAN INDICATE TO THE CAPTAIN THAT HE WANTED ANOTHER BARGE?

A YES, SIR, I DID.

Q NOW, HOW DID YOU ALL MAKE ARRANGEMENTS TO PICK UP ITS BARGE?

A THE INEXCO MAN TOLD PRESTON HE NEEDED ANOTHER BARGE AND PRESTON SAID OKAY. HE WENT ON THE BARGE – I MEAN WENT ON THE SUTTON.

Q WHO IS HE?

A PRESTON DID.

Q OKAY.

A PRESTON HEBERT WHICH WAS THE CAPTAIN. SHOULD I USE CAPTAIN INSTEAD OF HIS NAME OR WHATEVER?

Q JUST WHATEVER.

A OKAY. CAPTAIN HEBERT WENT OVER TO THE BARGE ON THE SUTTON AND RADIOED LEE BERNARD, WHICH IS THE SUPERVISOR, OKAY. I COULDN'T HEAR WHAT PRESTON WAS TELLING LEE BECAUSE PRESTON WAS TALKING INTO THE MIKE,

BUT I COULD HEAR WHEN LEE WOULD RELAY THE MESSAGE BACK TO CAPTAIN HEBERT.

Q YOU COULDN'T HEAR CAPTAIN HEBERT BUT YOU COULD HEAR LEE BERNARD?

A YES, SIR, I COULD.

[p. 512] Q ALL RIGHT. WHAT DID LEE BERNARD SAY?

A LEE BERNARD TOLD PRESTON TO STAND BY FOR A FEW MINUTES, HE WILL CALL HIM BACK. HE WAS GOING TO CALL BROUSSARD BROTHERS AND LINE UP A BARGE FOR THE NEXT DAY.

Q AND DID LEE BERNARD CALL BACK?

A LEE BERNARD CALLED BACK IN A SHORT TIME AND TOLD PRESTON THAT THERE WAS A BARGE AT THE 161 DOCK, FOR US TO PICK IT UP THAT AFTERNOON AND MAKE SURE THAT WE HAVE IT ALL READY FOR THE NEXT DAY.

Q OKAY. NOW, WHAT TIME OF THE DAY WAS IT WHEN YOU ALL ACTUALLY STARTED HEADING BACK TOWARD THE BROUSSARD BROTHERS BARGE AND YOU ALL LEFT THE INEXCO WELL FACILITY?

A IT WAS BETWEEN FOUR THIRTY AND A QUARTER OF FIVE.

Q OKAY. AND THEN YOU ALL HAD TO GO BACK THROUGH THE LOCKS AGAIN?

A YES, SIR, WE HAVE TO.

Q DID YOU ASSIST KEVIN WARNER WITH THE LINES IN THE LOCKS ON THE WAY BACK?

A I DON'T REMEMBER, BUT I DO REMEMBER THAT WE HAD TROUBLE IN THE LOCKS.

Q WHEN YOU SAY TROUBLE, WHAT DO YOU MEAN?

A THE LOCKS WAS HAVING TROUBLE, NOT US.

Q SO HOW LONG DID YOU ALL HAVE TO SIT IN THE LOCKS?

A WE STAYED IN THE LOCKS QUITE A WHILE, I DON'T REMEMBER HOW LONG, BUT WE STAYED IN THERE A GOOD WHILE

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[p. 516] Q IS IT YOUR TESTIMONY THAT ONLY ONE WAS WORKING?

A ONLY ONE.

MR. WALLACE: OBJECTION, LEADING, YOUR HONOR.

MR. FONTENOT: I WILL JUST RE-ASK THE QUESTION.

THE COURT: OH, HE HAS ALREADY ANSWERED, THAT'S ALL RIGHT, LET'S GO ON. WE HAVE SAT HERE FOR TWO DAYS, I WOULDN'T BE SURPRISED WHAT THE EVIDENCE WOULD BE, BUT GO AHEAD.

Q TO YOUR KNOWLEDGE ONE WAS WORKING?

A YES, SIR.

Q DO YOU KNOW WHAT WAS WRONG WITH THE OTHER ONE?

A I WOULD SAY IT WAS NOT CONNECTED.

Q OKAY. CAN YOU EXPLAIN TO THE COURT WHAT YOU ALL HAD TO DO ONCE YOU ALL ARRIVED AT THE BROUSSARD BROTHERS DOCK AREA TO FIND THE BARGE THAT YOU ALL WANTED?

A WHEN WE ARRIVED AT THE BROUSSARD BROTHERS DOCK – I WANT TO TAKE MY TIME, I'M A LITTLE NERVOUS HERE, YOU WILL HAVE TO EXCUSE ME, I HAVE NEVER BEEN IN THIS KIND OF SITUATION BEFORE. WHEN WE ARRIVED TO THE BROUSSARD BROTHERS DOCK THAT FRIDAY AFTERNOON TO GET THE BARGE THAT WE HAD WE HAD TO GO ALL OF THE WAY TO THE BACK BECAUSE WE DID NOT KNOW WHERE THE BARGE WAS.

Q OKAY.

[p. 517] A SO WE STARTED LOOKING FOR THE BARGE. KEVIN AND I, PRESTON DROVE UP TO SOME OF THE BARGES THAT WAS ALREADY – KEVIN AND I GOT OFF THE SUTTON AND GOT ONTO THE BARGES.

Q LET ME STOP YOU RIGHT THERE. BEFORE YOU ALL ACTUALLY FOUND THE BARGE YOU WANTED YOU ALL HAD STOPPED AT OTHER BARGES AND GOT OFF ON THEM?

A YES, SIR, WE WENT TO THE FAR END OF THE SLIP.

Q OKAY.

A THE BARGES AT THE FAR END, AND WE STARTED LOOKING FOR THE BARGE COMING THIS WAY AT THE ENTRANCE END.

Q OKAY. AND HOW DID YOU ALL LOOK FOR THE BARGE?

A KEVIN AND I GOT OFF THE SUTTON ONTO THE EMPTY BARGES.

Q OKAY.

A AND WE WOULD LOOK FOR THE NUMBER ON THE BARGE ON THE SIDE. SOME OF THE BARGES WE HAD TO TIE ONE END OF THE CABLE WITH THE ROPE ON THE BIT SO PRESTON COULD PULL IT BACK SO THAT WE COULD SEE THE NUMBER ON THE ONE THAT WAS AGAINST THE DOCK.

Q AND IF IT WASN'T THE BARGE WHAT WOULD PRESTON DO?

A SHOVE IT BACK TO THE DOCK AND TIE IT BACK UP.

Q AND YOU HELPED KEVIN DO THIS?

A YES, I DID.

Q OKAY. WERE THESE BARGES THAT YOU ALL LOOKED AT [p. 518] AND GOT ON, DID THEY HAVE SCRAP MATERIAL OR STUFF ON THEM OR WERE THEY EMPTY BARGES?

A THEY WERE EMPTY BARGES.

Q OKAY. WHEN YOU ALL WERE ON THESE BARGES THAT WERE EMPTY LOOKING FOR – WHAT

WAS THE BARGE NUMBER YOU WERE LOOKING FOR?

A WE WERE LOOKING FOR BARGE B.B. 243.

Q OKAY. WHEN YOU ALL WERE LOOKING FOR THE 243 AND YOU ALL WERE WALKING ON THESE OTHER BARGES BEFORE THAT HOW DID THE CAPTAIN USE THE SPOTLIGHT?

A HE WOULD RUN THE SPOTLIGHT UP INTO WHERE WE HAD THE NUMBER, BACK AND FORTH TO FIND THE NUMBER, HE WAS NOT SHOWING IT FOR US TO WALK, HE WAS SHOWING IT FOR TO FIND THE NUMBERS.

Q OKAY. BUT HE MOVED THE LIGHT AROUND?

A YEAH. IT ALSO GAVE US LIGHT TO WALK ALSO.

Q OKAY. DID YOU HAVE ANY TROUBLE WALKING ON THESE EMPTY BARGES?

A NO, SIR, I DIDN'T.

Q NOW, APPROXIMATELY WHAT TIME AT NIGHT WAS IT WHEN YOU ALL LOCATED THE BARGE YOU WANTED, THE B.B. 243?

A IT HAD TO HAVE BEEN BETWEEN TEN AND TEN THIRTY, A QUARTER OF ELEVEN.

Q OKAY. AND WHAT TIME HAD YOU ALL STARTED THAT MORNING?

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[p. 529] Q SO YOU WANT ME TO GO AHEAD AND –

A IT WAS AGAINST THE DOCK.

Q I'M GOING TO JUST DRAW A LITTLE BOX SO THAT WE WILL KNOW THAT – IS THAT THE WAY THE BARGE WAS, THE 243?

A YES, SIR.

Q OKAY. NOW, I THINK YESTERDAY YOU TESTIFIED THAT THE CAPTAIN INSTRUCTED YOU TO GO HELP KEVIN WARNER. WHEN YOU WENT TO HELP KEVIN WARNER WHAT WAS THE WEATHER LIKE AT THAT PARTICULAR MOMENT?

A THE WEATHER WAS REAL BAD, IT WAS A LOT OF HARD – RAINING REAL HARD.

Q OKAY. WAS IT LIGHTNING?

A LIGHTNING AND THUNDERING AND THE WIND WAS BLOWING.

Q OKAY. NOW, WHERE DID KEVIN GO?

A KEVIN GO TO THE LEFT.

Q OKAY. WHERE IS THE BIT THAT HE WAS TRYING TO GET TO?

A THE BIT WAS ON THE FAR CORNER.

Q RIGHT HERE (INDICATING)?

A YES, SIR.

Q I'M GOING TO MARK K-1 FOR THE BIT THAT KEVIN WARNER WAS GOING TO (MARKING). ALL

RIGHT. AND I'M GOING TO DRAW A DOTTED LINE. CAN YOU TAKE YOUR CANE AND JUST KIND OF POINT THE ROUTE THAT HE WALKED, IF YOU KNOW?

[p. 530] A I DON'T KNOW WHAT ROUTE HE WALKED, ALL I KNOW HE TOOK OFF TO THE LEFT.

Q HE WENT TO THE LEFT?

A YES, SIR.

Q AND HE WAS GOING TO THE K-1 BIT?

A YES, SIR. WHEN WE STARTED – WHEN HE TURNED OFF TO GO TO THE LEFT I DIDN'T NOTICE TO SEE WHICH WAY HE CROSSED OR NOT.

Q OKAY. NOW, WHICH WAY DID YOU GO WHEN YOU GOT ON THE BARGE?

A AFTER I GOT ON THE BARGE I TURNED TO THE RIGHT.

Q OKAY. NOW, HOW FAR TO THE RIGHT DID YOU WALK DOWN THE BARGE, SHOW ME WHERE?

A I CAME ALL OF THE WAY UP TO RIGHT HERE (INDICATING).

Q ABOUT RIGHT HERE (INDICATING)?

A YES, SIR.

Q OKAY, I WILL MARK THIS – LET ME PUT A LITTLE NUMBER HERE.

MR. WALLACE: COUNSEL, DO YOU WANT TO PUT A 'D' THE SAME AS IN THE DEPOSITION?

MR. FONTENOT: THAT'S FINE.

Q I'M GOING TO PUT A 'D' WHERE YOU WALKED. SO YOU WALKED FROM I GUESS POINT 'X' WHERE THE BOAT WAS TIED UP TO THE BARGE TO POINT 'D'?

[p. 531] A YES, SIR.

Q OKAY. AND THEN AFTER YOU GOT TO POINT 'D' WHERE WERE YOU HEADED TOWARD?

A I WAS HEADED AT THE UPPER CORNER.

Q RIGHT UP HERE (INDICATING)?

A YES, SIR.

Q WHAT WAS THERE?

A THAT WAS THE BIT.

Q OKAY. I'M GOING TO PUT L-1 AT THE BIT YOU WERE TRYING TO GET TO (MARKING). ALL RIGHT. NOW, AFTER YOU GOT TO POINT 'D' WHAT DID YOU DO?

A WHEN I GOT TO POINT 'D' I LOOKED OVER TO SEE WHERE COULD I PASS. THERE WAS NO WAY I COULD HAVE GONE ANY FURTHER BECAUSE THERE WAS A WHOLE LOT OF MATERIAL ALL OF THE WAY ACROSS THERE ON THE BARGE.

Q WHERE; COULD YOU –

A IT WAS ALL OF THE WAY ACROSS FROM END TO END AS FAR AS I COULD SEE.

Q THIS END TO END OR THIS END TO END?

A FROM THIS END ALL OF THE WAY ACROSS (INDICATING).

Q OKAY. I WILL DRAW JUST A LITTLE STRIP, TALKING ABOUT – FOR THE RECORD, A SCRIBBLY LINE ALL OF THE WAY ACROSS THE MIDDLE OF THE BARGE WHAT LESTER WAS DESCRIBING WAS THE MATERIAL (MARKING).

A YEAH.

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[p. 581] TOLD TO GO OUT AND TIE – UNTIE THE BARGE.

Q ALL RIGHT. NOW, SPECIFICALLY WHAT DID YOU THINK YOU WERE GOING TO HAVE TO DO TO GET OVER TO THE BIT WHERE THEY TOLD YOU YOU WERE SUPPOSED TO HANDLE THE LINE?

A WELL, I KNEW I HAD TO GO ACROSS THE BARGE.

Q ALL RIGHT. DID YOU THINK IN YOUR MIND, DO I HAVE TO GO STRAIGHT ACROSS THE BARGE OR DO I MAKE A RIGHT AND WALK AROUND THE OUTSIDE OF THE BARGE OR DO I TAKE A LEFT AND GO AROUND THE OTHER WAY?

A NO SIR, I DIDN'T KNOW.

Q ALL RIGHT. DID YOU KNOW THAT ONCE YOU GOT OVER THERE WHAT YOU WERE SUPPOSED TO GO?

A YEAH, I WAS SUPPOSED TO UNTIE THE ROPE OFF THE FAR CORNER OVER THERE.

Q ALL RIGHT, NOW, BEFORE YOU ACTUALLY FOUND THE B.B. 242 – I'M SORRY, YOU MARKED IT THE B.B. 243. THAT IS THE BARGE BEHIND THE SCRAP BARGE?

A NO, WE DIDN'T KNOW WHERE THE BARGE WAS.

Q BEFORE YOU FOUND THAT B.B. 243 YOU WENT BACK INTO THE SLIP AND YOU LOOKED FOR OTHER BARGES?

A YES, WE DID.

Q ALL RIGHT. AND YOU WERE BACK IN THE SLIP FOR AT LEAST FIFTEEN MINUTES OR MORE WALKING ON THE BARGES WITH KEVIN WARNER AND LOOKING FOR THE B.B. 243, IS THAT RIGHT?

A YES, SIR.

[p. 582] Q ALL RIGHT. AND WHILE YOU WERE BACK IN THE SLIP YOU HAD WALKED ON A NUMBER OF BARGES BEFORE YOU FOUND THE RIGHT BARGE, IS THAT RIGHT?

A YES, SIR. WE DID NOT KNOW WHERE THE BARGE WAS.

Q NOW, AS I UNDERSTAND IT, AND CORRECT ME IF I'M WRONG, IT WAS RAINING BACK IN THE SLIP THE SAME AS IT WAS RAINING AT THE TIME OF YOUR ACCIDENT, ISN'T THAT TRUE?

A YES, SIR, IT WAS.

Q NOW, WHEN YOU WERE WALKING ON THE BARGES BACK IN THE SLIP DID YOU HAVE ANY PROBLEM WALKING?

A NO, SIR, THERE WAS NO PROBLEM, THERE WAS NO SCRAP MATERIAL, THOSE WERE CLEAN BARGES.

Q OKAY. DID THE WEATHER BOTHER YOU BACK THERE?

A NO, SIR, I DON'T BELIEVE IT DID.

Q ALL RIGHT. AND AFTER YOU FOUND THE BARGES – EXCUSE ME, AFTER YOU FINISHED LOOKING BACK IN THE SLIP IS IT TRUE THAT YOU STAYED ON THE DECK OF THE SUTTON OUTSIDE UP UNTIL YOU CAME ALONG AND FOUND THE B.B. 243?

A I MIGHT HAVE GONE DOWN ON THE DECK ON OCCASION, BUT I WAS UP IN THE WHEELHOUSE WHEN THEY FOUND IT. I WAS UP IN THE WHEELHOUSE HERE WITH PRESTON.

Q YOUR TESTIMONY IS YOU WERE IN THE WHEELHOUSE AT THE TIME THEY FOUND THE B.B. 243?

A YES.

Q OKAY. NOW, WHILE WALKING BACK ON THE BARGES BACK [p. 583] IN THE SLIP DID THE CAPTAIN HAVE ONLY ONE SPOTLIGHT ON?

A YES, HE DID.

Q DURING THAT FIFTEEN MINUTES YOU WERE BACK IN THERE DID YOUR EYES BECOME ACCUSTOMED TO THE AMOUNT OF LIGHT THAT WAS OUT THERE; DID YOU GET USED TO THE AMOUNT OF LIGHT THAT YOU COULD SEE TO GO FROM PLACE TO PLACE?

A NO, ONLY – PRESTON JUST SHOWED THE LIGHT ON THE – WHERE THE NUMBER OF THE BARGE WAS.

Q TO YOUR RECOLLECTION MR. HEBERT NEVER SHOWN – SHINED THE LIGHT ON YOU WHILE YOU WERE BACK THERE IN THE SLIP WALKING ON THE BARGES, IS THAT CORRECT?

A I DON'T BELIEVE; HE COULD HAVE FLASHED IT BACK AND FORTH, I REALLY DON'T REMEMBER.

Q OKAY. WELL, MY QUESTION WAS, WHILE YOU WERE BACK IN THE SLIP DID THE CAPTAIN ONLY HAVE ONE SPOTLIGHT ON?

A YES, SIR, ONLY ONE.

Q AND YOU WALKED AROUND ON THE BARGES BACK THERE FOR AT LEAST FIFTEEN MINUTES AND YOU NEVER ASKED FOR A FLASHLIGHT IS THAT TRUE?

A I NEVER ASKED FOR A FLASHLIGHT, THAT IS TRUE.

Q NOW, WHILE YOU WERE STANDING OUTSIDE FOR THAT FIFTEEN MINUTES, DID YOU HAVE PROBLEMS WALKING AND SEEING WHERE YOU WERE WALKING ON THOSE BARGES?

A NO, THOSE WAS CLEAN BARGES.

Q BUT I'M JUST ASKING YOU ABOUT THE ABILITY OF YOU

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[p. 603] A YES, SIR, I DO.

Q AND DID YOU GIVE A DEPOSITION IN JUNE OF 1989, THIS YEAR?

A YES, SIR, I DID.

Q AT THE TIME YOU GAVE THAT DEPOSITION WERE YOU TELLING THE TRUTH?

A YES, SIR, I ALWAYS TRY TO TELL THE TRUTH.

Q NOW, MR. LEVENE, WERE YOU TELLING THE TRUTH WHEN THE QUESTION WAS ASKED ON PAGE 111, THE QUESTION ON LINE 11; I'M NOT ASKING IF YOU SAW EVERYTHING, BUT WERE YOU LOOKING DOWN AT YOUR FEET WHEN YOU WERE WALKING FROM POSITION 'D' DOWN TO THE PLACE WHERE YOU SLIPPED AND FELL, IS THAT CORRECT? ANSWER; YES. I WAS BEING CAREFUL WITH MY FEET STEPS, YES. QUESTION: YOU FELT COMFORTABLE IN WALKING FROM 'D' TO THE POINT WHERE YOU FELL AND YOU HAD ENOUGH LIGHT THAT YOU BELIEVE YOU COULD SAFELY SEE WHAT YOU NEEDED TO SEE, NOT EVERYTHING, BUT WHAT YOU NEEDED TO SEE OF THE SCRAP MATERIAL AND WALK ACROSS THAT SCRAP MATERIAL? ANSWER: YES.

A YES, I WAS TRYING TO BE CAREFUL.

Q OKAY.

THE COURT: DID YOU SAY WHAT – IS THAT ACCURATE, WHAT HE JUST READ?

THE WITNESS: YES SIR. I WAS TRYING TO BE CAREFUL.

* * *

[p. 613] Q NO, MY QUESTION TO YOU, MR. LEVENE, WAS WHEN YOU GOT UP ON THE SCRAP YOU IN YOUR OWN MIND FELT LIKE YOU COULD CROSS IT SAFELY IF YOU WERE CAREFUL?

A WELL, THAT'S WHAT I'M SAYING NOW, I'M EXPLAINING THAT TO YOU NOW, THAT IS THE WAY I WENT BECAUSE I FELT THAT IT WAS SAFE, THAT WAS THE ONLY PLACE SAFE ENOUGH FOR ME TO GO ACROSS.

Q THAT IS THE SAFEST PLACE YOU FELT –

A I FELT THAT IT WAS SAFE FOR ME TO GO ACROSS –

Q OKAY. THAT WAS MY QUESTION.

A – WITHOUT HAVING AN ACCIDENT.

Q AND YOU DIDN'T FEEL LIKE YOU NEEDED ANYTHING ELSE OTHER THAN WHAT YOU HAD IN ORDER TO SAFELY COMPLETE THE LINE-HANDLING OPERATION, ISN'T THAT RIGHT?

A NO, I DIDN'T THOUGHT TO ASK FOR ANY-THING ELSE.

Q LIKE FLASHLIGHTS, YOU DIDN'T FEEL LIKE YOU NEEDED THAT, DID YOU?

A THERE WAS NO FLASHLIGHT TO ASK FOR.

Q BUT JUST LIKE – YOU DIDN'T FEEL LIKE YOU NEEDED ONE, DID YOU?

A NO, THERE WAS NONE TO ASK FOR IF I DID.

Q YOU DIDN'T FEEL LIKE YOU NEEDED A HAND-LIGHT, DID YOU?

A NO, I DIDN'T ASK FOR ANYTHING.

Q DIDN'T FEEL LIKE YOU NEEDED MORE LIGHT FROM THE [p. 614] SPOTLIGHT, DID YOU?

A NO, KEVIN WARNER DIDN'T ASK FOR ANY.

Q OKAY. AS A MATTER OF FACT, YOU HAD NO HESITATION AT ALL ABOUT GOING OUT ON THAT BARGE THAT NIGHT TO DO THAT OPERATION, DID YOU?

A I DON'T ASK ANY QUESTIONS WHEN I'M ORDERED TO DO SOMETHING.

Q BUT YOU HAD NO HESITATION, NO DOUBTS IN YOUR OWN MIND AT THAT TIME, DID YOU?

A WHEN I'M ORDERED TO GO OUT TO DO WORK, I DON'T ASK QUESTIONS, I GO OUT AND PURSUE MY WORK.

Q IN YOUR MIND YOU HAD NO HESITATION ABOUT GOING OUT TO DO THAT OPERATION THAT NIGHT DID YOU?

A I DON'T KNOW WHY I SHOULD HAVE ANY HESITATION –

Q JUST ANSWER ME YES OR NO, MR. LEVENE.

MR. MCELLIGOTT: I THINK THE WITNESS IS EXPLAINING.

THE COURT: NO, I DON'T THINK SO. YOU CAN ANSWER THAT QUESTION YES OR NO. DID YOU HAVE ANY HESITATION ABOUT GOING OVER TO THE BARGE 243 THAT NIGHT?

THE WITNESS: JUDGE, WHEN I'M WORKING I NEVER HAVE HESITATION IN ANY OF MY WORK.

MR. SCOBEE: FOR THE RECORD, LET ME OBJECT TO THE RESPONSIVENESS OF THAT ANSWER, YOUR HONOR.

THE COURT: I HAVE GOT A PRETTY GOOD

* * *

[p. 619] BY MR. SCOBEE:

Q MR. LEVENE, AS I UNDERSTAND IT, AT THE POINT WHERE YOU FELL, THE SCRAP MATERIAL THAT WAS UNDERNEATH YOUR FOOT SLIPPED OUT FROM UNDERNEATH YOU, YOUR FOOT DID NOT SLIP ON TOP OF THE MATERIAL YOU WERE WALKING ON, IS THAT CORRECT, IT SHIFTED AND MOVED UNDERNEATH YOU; DO YOU RECALL?

A WOULD YOU EXPLAIN THAT AGAIN?

Q ALL RIGHT. LET ME SEE IF I CAN REFRESH YOUR RECOLLECTION.

A I DON'T KNOW WHAT – THERE IS SO MUCH I JUST DON'T UNDERSTAND THE STUFF YOU GOT THERE.

Q I WANT TO REFRESH YOUR MEMORY BY READING TO YOU FROM YOUR 1989 DEPOSITION AT PAGE 137, LINE 1, IT WAS A QUESTION I WAS ASKING YOU AT YOUR DEPOSITION. QUESTION: THE PIPE CAN EITHER ROLL OUT FROM UNDERNEATH MY FOOT, I'M DESCRIBING HOW HYPOTHETICALLY AN ACCIDENT MIGHT HAPPEN, THE PIPE CAN EITHER ROLL OUT FROM UNDERNEATH MY FOOT AND I CAN SLIP OR MY FOOT CAN SLIP OFF THE PIPE. WHICH WAY WAS IT? ANSWER: WHEN I WALKED ON THE MATERIAL IT MOVED, THE PIECE, OR WHATEVER I STEPPED ON, IT JUST MOVED AND IT CAUSED ME TO SLIP. QUESTION: SO YOUR FOOT DID NOT SLIP ON THE SCRAP AT ALL, THE SCRAP JUST MOVED UNDERNEATH YOUR FOOT? ANSWER: YES, SIR.

A YEAH, I COULD HAVE SAID THAT.

* * *

[p. 671] A HE HAD A VERY MODERATE AMOUNT OF EXPERIENCE, BUT I CAN TEACH A CHIMPANZEE TO HANDLE LINES IN THIRTY MINUTES, SO I DON'T THINK IT TAKES ANY GREAT AMOUNT OF TRAINING OR SKILL, ALMOST ANYBODY CAN DO THAT.

Q ALL RIGHT. WOULDN'T YOU AGREE THAT THE JOB MR. LEVENE WAS ASKED TO DO ON THE NIGHT OF THE ACCIDENT, AS HE SAYS HE WAS ASKED TO DO, WAS A RELATIVELY SIMPLE JOB THAT REQUIRED VERY LITTLE, IF ANY, INSTRUCTION?

A YES, THAT'S CORRECT.

Q AND WOULDN'T YOU AGREE THAT THE SUTTON WAS IN A REASONABLY SAFE CONDITION BEORE LESTER LEVENE GOT ONTO THE SCRAP BARGE, SUCH THAT A COMPETENT PERSON COULD HAVE OPERATED ONE SPOTLIGHT, EITHER ONE OF THE SPOTLIGHTS ON THE SUTTON, TO PROVIDE PROPER ILLUMINATION TO MR. LEVENE AND MR. WARNER ON THE BARGE?

A YES.

Q SO YOUR FINDING OF FAULT WITH THE SUTTON IS NOT IN PARTICULAR WITH THE VESSEL ITSELF OR ANY CONDITION ON THE VESSEL BUT IN HOW THE SINGLE SPOTLIGHT WAS OPERATED, IS THAT CORRECT?

A YES, THAT IS CORRECT.

Q NOW, IN YOUR OPINION CAPTAIN HEBERT COULD HAVE HAD HE SEEN KEVIN WARNER OR PRESTON HEBERT – EXCUSE ME, KEVIN WARNER OR LESTER LEVENE ACTUALLY WALKING ON THE PIPE OR ENCOUNTERING SOME HAZARD, HE COULD HAVE SHINED

* * *

[p. 673] YOU ARE GOING.

Q NOW, THE ILLUMINATION THAT IS NEEDED ON A BARGE SUCH AS THIS, IS THIS THE ILLUMINATION THAT YOU NEED TO THREAD A NEEDLE OR READ A BOOK?

A NO, I WOULDN'T SAY SO.

Q WOULD YOU AGREE THAT THE ILLUMINATION NECESSARY ON THE BARGE IN THIS PARTICULAR TYPE OPERATION IS ILLUMINATION WHICH ALLOWS THE MEN TO SEE AND WALK ON OR AROUND OBJECTS WHICH ARE ON THE DECK OF THE BARGE?

A THAT'S RIGHT.

Q AND WOULD YOU AGREE THAT IF THE LIGHT IS SHINED – THE LIGHT OF THE SUTTON HAD BEEN SHINED IN THE CENTER OF THE BARGE, AS DESCRIBED BY CAPTAIN HEBERT, THAT THE LIGHT WOULD SPREAD OUT AND CAST SUFFICIENT LIGHT TO OBSERVE THE OBJECTS WHICH WERE ON THE DECK OF THE BARGE AND TO AVOID THOSE?

A I DON'T KNOW THAT IT WOULD. YOU ARE ONLY TALKING ABOUT A BARGE THAT IS THIRTY FEET WIDE AND YOU WOULDN'T EXPECT A SEARCHLIGHT BEAM OR A SPOTLIGHT BEAM TO SPREAD OUT FIFTY FEET ON EACH SIDE, NOT IN THAT SHORT A DISTANCE ANYWAY. THERE MAY BE SOME REFLECTED LIGHT OFF OF THE PIECES OF EQUIPMENT THAT THE LIGHT WAS DIRECTED ON, BUT I WOULDN'T EXPECT VERY MUCH LIGHT.

Q ALL RIGHT. NOW, IN MAKING THAT KIND OF STATEMENT, ARE YOU CONSIDERING THE TESTIMONY OF KEVIN

* * *

[p. 679] WAS OPEN AND OBVIOUS TO HIM, CORRECT?

A I WOULD THINK SO.

Q WOULD YOU ALSO AGREE, MR. VORENKAMP, THAT THE LOCATION AND NATURE OF THE OIL FIELD EQUIPMENT THAT MR. LEVENE DESCRIBED WAS OPEN AND OBVIOUS TO HIM BEFORE HE STEPPED ON IT?

A WELL, I DON'T KNOW. HE SAID HE WAS IN THE WHEELHOUSE, SO I'M SURE THAT HE COULD SEE THAT THERE WAS EQUIPMENT ON THE BARGE, AND EQUALLY WHEN HE STEPPED ON THE BARGE HE COULD CERTAINLY SEE SOME OF IT DIRECTLY IN THE BEAM OF THE SPOTLIGHT.

Q ALL RIGHT. MR. VORENKAMP, DO YOU UNDERSTAND THE TYPE OF PIPES AND OTHER SCRAP MATERIAL THAT MR. LEVENE SAID HE WAS WALKING ON; HAVE YOU EVER ENCOUNTERED THAT BEFORE?

A OH, YES.

Q AND WOULDN'T YOU AGREE THAT AN INDIVIDUAL WHO DECIDES TO WALK ON PIPES OR OTHER SCRAP MATERIAL THAT MR. LEVENE DESCRIBED ON WHICH HE FELL TAKES A CERTAIN RISK IN DOING THAT?

A YES, IT IS TRICKY.

Q AND WOULDN'T YOU AGREE THAT ONE WHO DECIDES TO WALK ON PIPES OR OTHER SCRAP MATERIAL THAT IS LOOSE IS TAKING WHAT YOU WOULD TERM A NORMAL HAZARD THAT PEOPLE ENCOUNTER IN THE OIL FIELD EVERY DAY?

[p. 680] A YES.

Q AND IN YOUR OPINION WALKING ON OR ACROSS PIPES OR SCRAP MATERIAL, AS MR. LEVENE DESCRIBED, WAS NOT WHAT YOU WOULD CHARACTERIZE AS MR. LEVENE ENCOUNTERING AN UNREASONABLY DANGEROUS CONDITION?

A NO, I THINK WE AGREE THERE IS AN ELEMENT OF RISK IN IT, BUT IT IS COMMON IN THE OIL FIELD.

Q IN YOUR OPINION THE CONDITION, NATURE AND POSITION OF THE SCRAP MATERIAL ON THE BARGE WAS NOT AN UNREASONABLY DANGEROUS CONDITION TO WALK ACROSS ALTHOUGH IT DID PRESENT A HAZARD TO PEOPLE, IS THAT CORRECT?

A YES.

Q DO YOU AGREE THAT LESTER LEVENE'S FAILURE TO STOP BEFORE HE WALKED ON THE SCRAP MATERIAL AND EITHER ALERT THE CAPTAIN BY HAND SIGNALS OR TALKING TO HIM OR SIMPLY JUST WALKING BACK SEVERAL PACES TO THE TUG CONSTITUTED CONTRIBUTORY FAULT ON BEHALF OF MR. LEVENE?

MR. MCELLIGOTT: YOUR HONOR, I'M GOING TO OBJECT, I THINK –

THE COURT: I WILL SUSTAIN THE OBJECTION, I THINK AS MUCH AS I LIKE CAPTAIN VORENKAMPI DON'T THINK HE WANTS TO GET INTO GIVING CONTENT TO WHAT ARE KNOWN AS LEGAL PHRASES. I THINK HE DOESN'T WANT TO DO THAT, WHETHER SOMEBODY IS CONTRIBUTORILY NEGLIGENT OR ANYTHING ALONG THAT LINE.

* * *

[p. 698] BY MR. WALLACE:

Q AM I CORRECT, MR. VORENKAMP, THAT THE ONLY FAULT YOU FIND WITH PINTAIL IS IN THEIR CONDUCT OF THE OPERATION ON THE NIGHT OF THE ACCIDENT AND YOU FIND NOTHING WRONG WITH THE M.V. SUTTON ITSELF?

A I DON'T – I HAVEN'T HEARD ANYTHING TO TELL ME THAT THERE WAS ANYTHING WRONG WITH THE M.V. SUTTON, NO. SIR, JUST THE WAY THE OPERATION WAS CARRIED OUT.

MR. WALLACE: THANK YOU.

THE COURT: THANK YOU VERY MUCH.

(WITNESS EXCUSED)

THE COURT: I DON'T WANT TO INJECT MYSELF INTO WHAT YOU PERHAPS HAVE IN MIND LATER ON TODAY, BUT I CAN'T HELP BUT NOTICE BECAUSE THE RECORD DOES REFLECT THAT MRS. LEVENE HAS AN ABSCESSED TOOTH AND SHE IS OBVIOUSLY IN SOME DISCOMFORT. IF SHE IS NOT NEEDED THIS AFTERNOON, CAN'T WE –

MR. MCELLIGOTT: WE ARE FINISHED, YOUR HONOR.

THE COURT: COULD YOU TELL HER THAT SO SHE CAN GO BACK TO THE HOTEL.

MR. MCELLIGOTT: WE ARE GOING TO HAVE SOMEONE COME AND BRING THEM HOME.

THE COURT: OKAY. YOU WON'T NEED EITHER MR. OR MRS. LEVENE, MR. WALLACE?

* * *

[p. 753] A WITHOUT A HANDLIGHT.

Q WITHOUT HANDLIGHTS OR –

A RIGHT.

Q NOW, IN YOUR OPINION WAS THE SUTTON'S SPOTLIGHT REASONABLY FIT FOR ITS INTENDED PURPOSE AND PROPERLY USED THROUGHOUT THE LINE-HANDLING OPERATION?

A IN MY OPINION, YES.

Q WHY DO YOU SAY THAT?

A BECAUSE I HAVE WORKED WITH THIS LIGHT IN NUMEROUS OCCASIONS AND IT IS A GOOD – LIKE I SAID EARLIER, A GOOD ALL PURPOSE SPOTLIGHT. IT IS NOT THE KIND OF LIGHT THAT YOU WOULD USE ON BIG TOWS WHERE YOU ARE SEVEN OR EIGHT BARGES OUT IN FRONT OF YOU, YOU KNOW, I MEAN, BUT IT IS FOR SHIFTING IN THE FLEETS, SINGLE BARGE OPERATION, IT IS A GOOD ALL-PURPOSE LIGHT. BUT LIKE I MENTIONED EARLIER, IT IS A POWERFUL LIGHT IF YOU THROW IT IN SOMEBODY'S EYES, THAT IS WHY WHEN YOU ARE WORKING IN A LINE-HANDLING OPERATION, WHEN YOUR BOAT – WHEN YOU ARE HANDLING YOUR BOAT OR YOU KNOW THAT YOU ARE GOING TO BE SHIFTING, THAT YOU NEED CONTROL OF YOUR LIGHT.

Q ALL RIGHT. I WOULD LIKE FOR YOU TO ASSUME, CAPTAIN ANTRAINER, THAT ONLY ONE OF THE TWO SPOTLIGHTS ON THE SUTTON WAS IN

WORKING ORDER, AS MR. LEVENE CLAIMED, WOULD YOU STILL MAINTAIN THE OPINION THAT THE SUTTON WAS IN REASONABLY FIT AND SAFE CONDITION FOR A COMPETENT

* * *

[p. 757] IT IS A SQUARE BULB INSIDE THERE. BUT IT IS A RECTANGULAR TYPE SQUARE AND IT THROWS A LOT OF LIGHT OUT.

Q IN YOUR OPINION WAS THERE ANY UNREASONABLY DANGEROUS CONDITION OF THE SUTTON WHICH DEVELOPED DURING THE LINE-HANDLING OPERATION?

A NOT UNREASONABLY, NO.

Q IN YOUR OPINION WAS THERE ANY UNREASONABLY DANGEROUS CONDITION WHICH DEVELOPED ON THE BARGE DURING THE LINE-HANDLING OPERATION?

A NOT THAT I HAVE READ.

Q ALL RIGHT. CAPTAIN HEBERT TESTIFIED THAT FROM HIS PROSPECTIVE IN THE WHEELHOUSE HE COULD SEE TO THE RIGHT AND TO THE LEFT A CLEAR PATH WHERE LESTER LEVENE AND PRESTON WARNER WERE WALKING – EXCUSE ME, KEVIN WARNER WERE WALKING, AND THAT EXTENDED OUT ABOUT I THINK HE SAID BETWEEN THREE TO FOUR FEET INBOARD. GIVEN THAT PERSPECTIVE OF CAPTAIN HEBERT, DO YOU BELIEVE THAT HE EXERCISED GOOD JUDGMENT AS A CAPTAIN IN NOT SHINING THE LIGHT TO THE RIGHT OR

TO THE LEFT TO ILLUMINATE MORE DIRECTLY THE PATH OF MR. WARNER OR MR. LEVENE?

A WELL, NO, NOT REALLY, IT HAS BEEN MY EXPERIENCE THAT IF YOU GET THAT LIGHT OUT TOWARD THE CENTER OR WHAT WE CALL THE MID SECTION OF THE BARGE AND GET ENOUGH LIGHT GOING OUT TO EACH SIDE THAT EVEN THOUGH YOU CAN'T THREAD A NEEDLE BY THAT LIGHT THERE IS MORE THAN ADEQUATE LIGHT [p. 758] TO SEE WHERE YOU ARE WALKING, WHERE YOU ARE GOING TO. AND LIKE I SAY, THE LAST THING YOU WANT TO DO IS GET THAT LIGHT IN THOSE MEN'S EYES.

Q SO YOU BELIEVE HE EXERCISED GOOD JUDGMENT?

A I DO, YES, I DO.

Q IS THAT CONSISTENT WITH MARITIME PRACTICE, AS YOU KNOW IT?

A AS I KNOW IT.

Q GIVEN THAT SAME SCENARIO, THAT CAPTAIN HEBERT IS IN THE WHEELHOUSE AND HE SEES MR. LEVENE GO TO THE RIGHT AND MR. WARNER GO TO THE LEFT AND HE NO LONGER SEES THEM, AND DURING THE TIME HE SEES THEM THEY ARE ON A CLEAR PATH AT THE EDGE OF THE BARGE, IN YOUR OPINION SHOULD CAPTAIN HEBERT HAVE KNOWN THAT MR. WARNER OR MR. LEVENE WERE GOING TO WALK ACROSS THE MIDDLE OF THE BARGE WHERE THE SCRAP MATERIAL WAS AND

NOT AROUND THE OUTER EDGES OF THE BARGE WHERE THERE WAS A CLEAR PATH?

A I DON'T THINK THE CAPTAIN – IF IT HAD BEEN ME I WOULD THINK THEY WOULD JUST GO AROUND WHAT WE CALL THE GUNWALES, ALL RIGHT, WHICH IS THE OUTER PORTION OF THE BARGE, WHAT THEY NORMALLY LEAVE OPEN.

Q IS THAT THE PATH WE HAVE TALKED ABOUT?

A UH-HUH.

Q THREE TO FOUR FEET?

A THAT'S CORRECT.

APPENDIX 6

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

LESTER LEVENE, SR. and SHIRLEY LEVENE	:	CIVIL ACTION
VERSUS	:	NO. 87-0104
PINTAIL ENTERPRISES, INC. and BROUSSARD BROS., INC.	:	SECTION "O" (JUDGE LITTLE)

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF VERMILION

BEFORE ME, the undersigned authority, personally came and appeared

MICHAEL TRAHAN

who, after being duly sworn, did depose and state that:

1) He resides at Cypress Lane, Perry, Louisiana;

2) He is and has been president of Pintail Enterprises, Inc. ("Pintail"), since November, 1971, when it went into business;

3) Pintail is and always has been a small, general oilfield contractor, that primarily does maintenance and construction services, welding, and hookups for oilfield equipment;

4) Pintail employed Lester Levene, Sr. ("Levene") as an equipment operator for operation of its 18-ton "cherry picker" crane, backhoe, and bulldozer;

5) It was reported to him that Levene had an accident on the evening of February 7, 1986, at the Broussard Brothers ("Broussard") fleet in Abbeville, Louisiana;

6) The cherry picker was a piece of portable equipment which was driven onto a flat-deck barge owned by Broussard;

7) On the day of his accident, February 7, 1986, Levene operated a "cherry picker" crane that had been driven onto a barge, owned by Broussard Bros., Inc., and chartered by Pintail. This job assignment was for a specific job for Inexco, and did not represent a change in the general nature of Levene's job, which would require Levene to, in the future, spend a substantial amount of time working on vessels. Upon completion of the Inexco job, Levene was to return ashore, and perform his job as an equipment operator in the same fashion as before his accident.

8) Levene was a shore-based employee of Pintail who reported to work at the Pintail office in Abbeville, Louisiana, for his job assignment each day. During his employment with Pintail, he always slept at home and ate his meals onshore, except when he was, on rare occasion, working over water.

9) In the year before his accident, approximately 95% of the time Levene worked for Pintail was spent working on land in activities unrelated to any vessel, e.g., he was performing his job as a construction equipment operator. The nature of Levene's employment, and the amount of time he worked onshore did not significantly change while he worked for Pintail, *see* Exhibit 1.

10) In the 5% of the time Levene worked over water while employed for Pintail, he generally used a barge or tug as a work platform to do his work upon oilfield equipment located on a platform or onshore. When working over water, Levene always returned home at night.

11) On the occasions Levene was working over water, Levene was assigned to do oilfield construction and maintenance work on oilfield equipment from a vessel used as a work platform. Each such assignment was directed to a specific job using the vessel normally and normally lasting a day, and upon completion of his work, Levene returned ashore.

12) Levene's involvement with a vessel terminated when the specific job on the vessel was completed. He was not permanently assigned to a vessel or fleet of vessels while working for Pintail.

13) Levene lived at home and ate all his meals ashore while working for Pintail, except on the rare occasion when he stayed outside the shop overnight on a specific job. Upon completion of the job, he reported back to the Pintail shop.

14) Levene had no job duties with respect to the navigation, operation, or maintenance of a vessel or fleet of vessels.

/s/ Michael Trahan
MICHAEL TRAHAN

SUBSCRIBED AND SWORN TO
BEFORE ME, THIS 22nd
DAY OF AUGUST, 1988.

/s/ Maxine Dupuy
Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LESTER LEVENE, SR. and SHIRLEY LEVENE	:	CIVIL ACTION
VERSUS	:	NO. 87-0104
PINTAIL ENTERPRISES, INC. and BROUSSARD BROS., INC.	:	SECTION "O" (JUDGE LITTLE)

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF VERMILION

BEFORE ME, the undersigned authority, came and appeared

NEENAH L. GRIFFIN

who, after being duly sworn, did depose and say upon personal knowledge that:

1) She resides at Route 5, Box 2148, Abbeville, Louisiana 70510.

2) She is and has been an office manager for Pintail Enterprises ("Pintail") of Abbeville, Louisiana.

3) Pintail is, and has always been, an oilfield services contractor, specializing in lease services, welding, and hookups for oilfield machinery.

4) In February, 1986, Lester Levene was employed as a construction equipment operator for Pintail Enterprises.

5) She has maintained and prepared employee work records of Pintail which are kept to reflect the work done by each of its employees every day they worked, and she is custodian of those records.

6) The attached documents identified as Exhibit "1" are true, accurate, and genuine copies of all daily employee work records for Lester Levene for the time he worked at Pintail from February 1985 through February 1986, when he claims to have had an accident on a Broussard Bros. barge.

7) The attached work records are business records of Pintail and prepared by an employee of Pintail. The employee who records the information contained on them is required to record the information in order for the employees to receive a paycheck and account the charges to various clients of Pintail. The individual who records the information has knowledge of the information recorded on the employee work records; the information is recorded on a routine basis contemporaneously with the employee's work, and the employee work records are factual in nature and used by Pintail in the regular course of its business.

8) The attached work records were prepared on the dates when Levene worked for Pintail.

9) She has personally reviewed the attached employee work records of Lester Levene and determined the time Levene was working as an equipment operator on land and the time he was working over water. She has done this by checking the invoices of Pintail and confirming for whom Pintail's work was being done on the days Levene worked as shown on the attached employee work records, and whether Levene's work was done on a platform, vessel, or on land. A true, accurate and genuine copy of invoices of Pintail for each job on which Levene worked

outside of the shop are attached as Exhibit "2". These invoices are business records of Pintail prepared by Pintail in the regular course of business for billing clients.

10) The records of Pintail indicate that Levene worked and was paid for a total of 2,979.5 hours during the year preceding his alleged accident.

11) That of those 2,979.5 hours, only 162.5 hours were worked over water, and that this represents 5.4% of the total hours Levene worked over water for Pintail during the year preceding his alleged accident.

/s/ Neenah L. Griffin
NEENAH L. GRIFFIN

SUBSCRIBED AND SWORN TO
BEFORE ME, THIS 22nd
DAY OF August, 1988.

/s/ Maxine Dupuy
Notary Public

(3)

NO. 91-1576

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1991

LESTER LEVENE, SR. and SHIRLEY LEVENE
and
AMERICAN CASUALTY INSURANCE COMPANY
Petitioners

versus

PINTAIL ENTERPRISES, INC., LLOYDS OF LONDON, and SCOTTSDALE INSURANCE COMPANY
Respondents

FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETITIONERS, LESTER LEVENE, SR., SHIRLEY LEVENE, AND AMERICAN CASUALTY INSURANCE COMPANY

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STATUTE

28 U.S.C. § 1254 3

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents have alleged in their opposition brief that this Honorable Court has no jurisdiction over this matter because the Petition for Writ of Certiorari was not timely filed. It is the position of Respondents that a Suggestion for Rehearing pursuant to Rule 35(b) is not considered a petition for rehearing for purposes of Supreme Court Rule 13.4, and, therefore, the time for filing the Petition for Writ of Certiorari ran from the date of the appellate decision, September 19, 1991, and not from the denial of the Suggestion for Rehearing en banc on October 25, 1991.

Respondents, in a footnote on page 6 of their opposition brief, acknowledge that the Fifth Circuit's minute entry of October 25, 1991, does treat the Suggestion for Rehearing en banc as a Petition for Rehearing. Petitioners attached the U. S. Fifth Circuit's minute entry of October 25, 1991, to their Petition for Writ of Certiorari. It is very clear that the Fifth Circuit treated the Suggestion for Rehearing en banc filed by petitioners as a Petition for Rehearing.

Respondents conveniently omit the *published* Internal Operating Procedures of the U. S. Fifth Circuit accompanying Local Rule 35 from their opposition brief. The Fifth Circuit has a published practice of treating all suggestions for rehearing en banc, no matter how styled, as containing both petitions for panel rehearing and suggestions for rehearing en banc. See *Gonzalez v. Southern Pacific Transp. Co.*, 773 F.2d 637, 639 (5th Cir. 1985).

In *Gonzalez*, the U.S. Fifth Circuit made the following pronouncement:

"II.

[2] Southern Pacific has sought rehearing en banc, not by the panel. Nevertheless, a suggestion for rehearing en banc remains within the plenary control of the panel deciding the case unless voted en banc by a majority of active circuit judges. As the Internal Operating Procedures of the Fifth Circuit provide, '[a] *suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed.* The panel may grant rehearing without action by the full Court.'

Our Internal Operating Procedures demarcate the circumstances appropriate for rehearing en banc and for panel rehearing. En banc consideration is 'an extraordinary procedure which is intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court [or] Fifth Circuit precedent. Alleged errors...in the facts of the case...or error asserted in the misapplication of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.' " Id. at 641. (Emphasis added)

The Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit accompanying Local Rule 35 provide in part:

"Handling of Petition by the Judges

Panel Has Control - Although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the Court, the filing of a suggestion for rehearing en banc does not take the case out of the plenary con-

trol of the panel deciding the case. *A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed.* The panel may grant rehearing without action by the full Court." (Emphasis added).

As clearly described in the above *published* Internal Operating Procedures of the Fifth Circuit, the Fifth Circuit has a routine and standard practice of treating all suggestions for rehearing en banc as a petition for rehearing by the panel if no petition is filed. This is the exact procedure that the Fifth Circuit followed in this case as is reflected in the minute entry dated October 25, 1991. Petitioners relied on these published local rules and Internal Operating Procedures in calculating the time when the Petition for Writ of Certiorari had to be filed. The Petition for Writ of Certiorari was timely filed as it was filed within ninety (90) days from the October 25, 1991, minute entry by the U. S. Fifth Circuit denying the request for rehearing.

Respondents next contend that Petitioners failed to identify any jurisdictional basis for this Court. However, in Petitioners' brief under *Statement of Jurisdiction,* Petitioners specifically stated that this case is an appeal from the United States Fifth Circuit Court of Appeals. Petitioners further stated that the judgment sought to be reviewed was rendered on September 19, 1991, by the U. S. Fifth Circuit. Petitioners also stated that the Petition for Rehearing and Suggestion for Rehearing en banc filed by Petitioners was denied by the U. S. Fifth Circuit on October 25, 1991.

Petitioners clearly specified that jurisdiction was based on an appeal from a decision by the U. S. Fifth Circuit. 28 U.S.C. Section 1254 allows anyone to file a Petition for Writ of Certiorari with the United States Supreme

Court to review a case in the courts of appeals.

Although admittedly Petitioners cited the incorrect statute as a basis for jurisdiction, Petitioners specifically stated under *Statement of Jurisdiction* that this case was an appeal from the U. S. Fifth Circuit. Jurisdiction of this Honorable Court was succinctly stated by Petitioners in their brief. Respondents are attempting to divert the attention of the highest Court in the land away from the merits of this case by raising groundless jurisdictional objections.

Respectfully submitted,

DAVIDSON, MEAUX, SONNIER,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Reply to Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been forwarded to all counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this ____ day of May, 1992.

/s/ J. McElligott, Jr.
JOHN E. McELLIGOTT, JR.